

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915

No. [REDACTED] **280**

**ALLAN H. RICHARDSON, AS TREASURER OF PONTO RICO,
PLAINTIFF IN ERROR,**

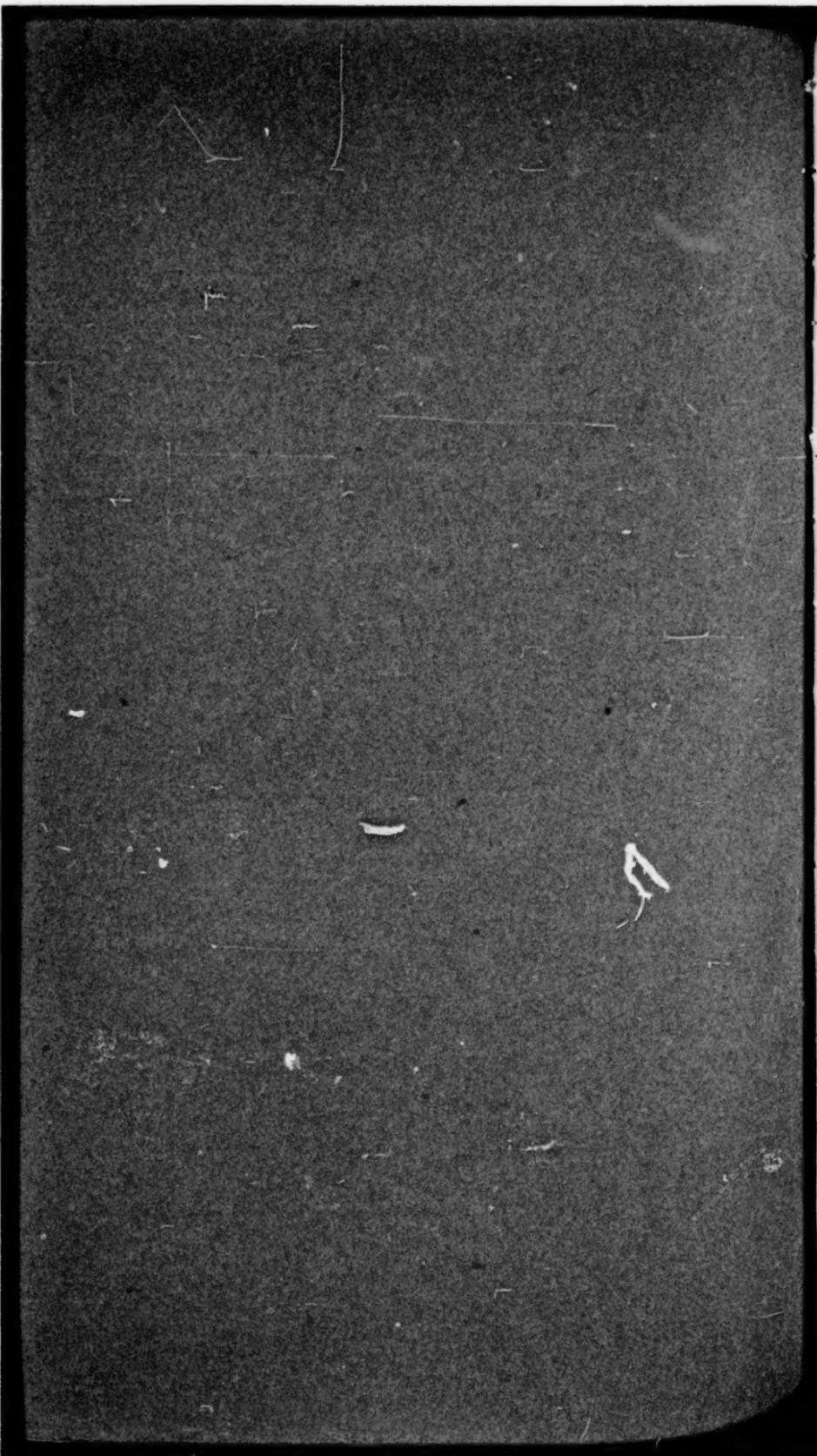
vs.

THE FAJARDO SUGAR COMPANY.

**ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
PONTO RICO.**

FILED NOVEMBER 10, 1914.

(24,434)



(24,434)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 690.

ALLAN H. RICHARDSON, AS TREASURER OF PORTO RICO,
PLAINTIFF IN ERROR,

vs.

THE FAJARDO SUGAR COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
PORTO RICO.

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a THE FAJARDO SUGAR COMPANY, a Corporation,
versus
ALLAN H. RICHARDSON, as Treasurer of P. R.

Transcript of Record.

1 District Court of the United States for the District of Porto Rico.

(Complaint Filed September 12, 1911.)

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

The Plaintiff, a corporation, duly organized under and by virtue of the laws of the State of New York, with its principal office and place of business at No. 106 Wall Street, City of New York, State of New York; and duly authorized to do business, as a foreign corporation, in the Island of Porto Rico with its local office in the town of Fajardo, Porto Rico, and possessing the power to sue and be sued in all the Courts of said Island, complains of the defendant, a resident of the Island of Porto Rico and a citizen of the United States, in his official capacity as present incumbent of the office of Treasurer of Porto Rico, and alleges:

I.

That the defendant assessed personal property belonging to the plaintiff for taxation in the fiscal year 1911-1912, in the amount of \$589,000.00, and, although the plaintiff duly protested to the defendant against said assessment so made, at the same time stating the grounds and reasons for making such protest, nevertheless and in spite of said protest and the reasons therefor, the defendant did fix and compute the taxes of the plaintiff on the property aforesaid in the amount of \$7,038.00, the said tax of \$7,038.00 being based and computed on the said assessed valuation of \$589,000.00
2 of the plaintiff's property as aforesaid, and the defendant did take steps to collect the same, whereupon the plaintiff on the 11th day of September, 1911, paid to the defendant the first installment of the said tax, amounting to \$3,534.00, under protest which the defendant took and now retains.

II.

That the personal property, so assessed, consisted at the time of the assessment, computation and collection, as aforesaid, and does now consist of shares of stock of other corporations, to wit:

Stock of the Fajardo Development Company, a corporation organized and existing under and by virtue of the laws of the State of Connecticut, and

Stock of the Porto Rico Progress Publishing Company, a corporation organized and existing under and by virtue of the laws of the Island of Porto Rico.

III.

That the said shares of stock were at all times mentioned herein, and are now, held by the plaintiff at its principal office in the State of its domicile, to wit: at 103 Wall Street, City of New York, State of New York; that all business relating to or in connection with said shares so held has at all times, and now is, transacted at the principal office of the plaintiff, as above described, and no business relating to or in connection with said shares of stock has been at any of the times mentioned herein, or now is, transacted within the Island of Porto Rico; and that said shares of stock were not at any of the times mentioned herein, nor are they now, situated within the Island of Porto Rico.

Wherefore the plaintiff demands judgment against the defendant that the amount of \$3,534.00 was wrongfully paid and ought 3 to be refunded, together with interest from the time of payment of said amount and the costs and disbursements of this action.

(Signed)

ARMSTRONG & KEITH,
ETHAN W. JUDD,
Representative for Porto Rico,
Attorneys for the Plaintiff.

Office and Post Office address: San Juan, Porto Rico.

ISLAND OF PORTO RICO, *District of Porto Rico, ss:*

Arthur D. Patton, being duly sworn, says as follows:
I am an officer of the Fajardo Sugar Company, the plaintiff above named, to wit, the acting general manager.

I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe it to be true.

(S'g'd)

ARTHUR D. PATON.

Before me personally came and appeared Arthur D. Paton, of age, single, business man, and a resident of Fajardo, Porto Rico, to me known and known to me to be the same person who executed the foregoing verification, and he acknowledges that he so executed it for the purpose therein set forth. San Juan, P. R., Sept. 11, 1911.

Affidavit No. 1182.

(S'g'd)

[SEAL.]

JUAN DE GUZMAN BENETIZ,
Notary Public.

4 In the District Court of the United States for Porto Rico.

(Filed September 21, 1911.)

818. Law.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.

SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Answer.

Comes now the defendant above named, Samuel D. Gromer, as Treasurer of Porto Rico, and for answer to the complaint of plaintiff filed herein, alleges as follows:

I.

Defendant admits that the plaintiff the Farjardo Sugar Company is a corporation duly created, organized and existing under and by virtue of the laws of the State of New York, and duly authorized to do business as a foreign corporation in the Island of Porto Rico, with power to sue and be sued in all the courts of said Island, with its local office located at the town of Fajardo, Porto Rico, but as to whether or not the principal office and place of business of said corporation is at No. 106 Wall St., City of New York, State of New York, this defendant has not sufficient knowledge or information upon which to form a belief as to the truth thereof, and therefore denies the same; but defendant admits that Samuel D.
5 Gromer is the duly and regularly appointed, qualified and acting Treasurer of Porto Rico.

II.

Defendant denies the allegations of paragraph I of plaintiff's complaint.

III.

Defendant denies the allegations contained in paragraph II of Plaintiff's complaint.

IV.

Defendant denies the allegations contained in paragraph III of plaintiff's complaint.

And defendant, further answering, and by way of defense to the complaint filed herein, alleges as follows:

I.

That on or about the 12th day of April, 1905, the above named plaintiff the Fajardo Sugar Company, a corporation duly organized,

created and existing under and by virtue of the laws of the State of New York, filed with the Secretary of Porto Rico a duly certified copy of its articles of incorporation, including consent to be sued and designation of agent and acceptance of agent, and was thereupon registered in the office of the Secretary of Porto Rico as a foreign corporation. (A certified copy of the articles of incorporation is hereto attached and made a part hereof.) Marked Ex. No. I.

II.

That thereafter said above named plaintiff was duly and
6 regularly licensed by the Treasurer of Porto Rico to engage
in the business of growing and grinding of sugar cane in all
of its branches within the Island of Porto Rico, and to engage in the
business of holding, purchasing, acquiring and selling, assigning
and transferring, or otherwise disposing of the shares of the capital
stock and bonds, etc., of other corporations, and to exercise all the
rights and privileges of ownership etc.

III.

That the said Fajardo Sugar Company, a corporation, has, since
the — day of —, 19—, been engaged in and is still engaged in
the growing and grinding of sugar cane in all of its branches ex-
clusively within the Island of Porto Rico, and has its principal place
of business within said Island in the City of Fajardo.

IV.

That under its articles of incorporation and license regularly is-
sued by the Treasurer of Porto Rico the said Fajardo Sugar Com-
pany is authorized to engage in the growing and grinding of sugar
cane in all of its branches, and to engage in the business of holding,
purchasing, acquiring and selling, assigning and transferring, or
otherwise disposing of the shares of the capital stock and bonds
etc. of other corporations, and to exercise all the rights and priv-
ileges of ownership, etc.

V.

That in pursuance of said authority contained in said
7 articles of incorporation, and as an incident to the business
being conducted in Porto Rico, the said company did ac-
quire, out of funds of its capital, 5,865 shares of the par value of
\$100 each, amounting to the sum of \$586,500, of the Fajardo De-
velopment Company, a corporation created, organized and existing
under and by virtue of the laws of the State of Connecticut, and
which said Fajardo Development Company is authorized, empowered
and licensed to do business in Porto Rico, and is and has been ex-
clusively engaged in business within said Island. (A certified copy
of said articles of incorporation is hereto attached and made a part
hereof.) Marked Ex. No. 2.

VI.

That thereafter the said Fajardo Sugar Company, a corporation, did acquire, out of its capital, shares to the amount of \$2,500 of the Porto Rico Progress Publishing Company, a corporation duly created, organized and existing under and by virtue of the laws of Porto Rico, and exclusively engaged in the transaction of business within the Island of Porto Rico.

VII.

That the shares of stock of the Fajardo Development Company and the Porto Rico Progress Publishing Company so purchased by the Fajardo Sugar Company, as aforesaid, constitute a part and parcel of the capital of the Fajardo Sugar Company, a corporation, which is employed in the transaction of business within the Island of Porto Rico.

VIII.

8 That the Fajardo Sugar Company, a corporation, is engaged exclusively in the transaction of business within the Island of Porto Rico, and conducts and carries on no other business except that which is incident to the main business of manufacturing sugar, to wit, the sale of the product manufactured in Porto Rico.

IX.

That during the Fiscal year 1911-12 the plaintiff herein, the Fajardo Sugar Company, a foreign corporation, had employed in the transaction of business within the Island of Porto Rico capital in the sum of \$2,633,006, upon which it was liable to taxation under the laws of Porto Rico.

X.

That the defendant Samuel D. Gromer, in his official capacity, caused to be duly assessed for taxation, for the fiscal year 1911-12, the capital of the Fajardo Sugar Company, a corporation, in the amount of \$2,633,006.00, and part of which capital—to the amount of \$589,000—consisted of the shares of stock owned by the said Fajardo Sugar Company in the Fajardo Development Company and the Porto Rico Progress Publishing Company, of which assessment the plaintiff was duly and regularly notified, and thereafter, on the 21st day of August, 1911, in pursuance of said notification of assessment, the said plaintiff, through counsel, appeared before the duly and regularly constituted Board of Review and Equalization with the object and purpose of securing the elimination of \$589,000, the amount of the capital of the Fajardo Sugar Company represented by the shares of stock of the Fajardo Development Company and the Porto Rico Progress Publishing Company from the assessment for the year 1911-12. (A copy of said assessment is hereto attached and made a part of this complaint. Marked Ex. No. 3.

XI.

That after a full and complete hearing of said application for the elimination of the sum of \$589,000 from the assessment of the capital stock of the Fajardo Sugar Company, represented by shares of stock in the Fajardo Development Company and the Porto Rico Progress Publishing Company, from said assessment. The said Board of Review and Equalization, on the same date, made a finding sustaining the assessment theretofore made under the order and direction of the Treasurer of Porto Rico, on the ground that the amount represented by the shares of the Fajardo Development Company and the Porto Rico Progress Publishing Company was capital actually invested in Porto Rico and capital actually employed by the Fajardo Sugar Company in the transaction of its business within the Island of Porto Rico. (A copy of which finding is hereto attached and made a part hereof.) Marked Ex. No. 4.

XII.

That the amount of taxes fixed and computed by the defendant Samuel D. Gromer upon the amount of capital of the Fajardo Sugar Company represented by the shares of stock owned by the Fajardo Sugar Company in the Fajardo Development Company and Porto Rico Progress Publishing Company amounted to the sum of \$7,068.00.

XIII.

That Samuel D. Gromer, as Treasurer of Porto Rico, took steps to collect the same, whereupon the plaintiff, on the 11th day of 10 September, 1911, paid to the defendant the first installment of said tax—amounting to \$3,534—under protest, which defendant accepted and now retains.

Wherefore, defendant prays that the complaint of plaintiff be dismissed, and that defendant may have judgment for costs.

(Sgd.)

FOSTER V. BROWN,
Attorney General of Porto Rico,
Attorney for Defendant.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

B. R. Dix, being first duly sworn, on oath deposes and says, that he is the duly appointed Assistant and Acting Treasurer of Porto Rico; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to those matters and things alleged on information and belief, and as to those matters he believes them to be true; that the reason he makes this affidavit in lieu of Samuel D. Gromer, the defendant herein, is on account of the serious illness of the said Samuel D. Gromer.

(Sgd.)

B. R. DIX.

No. 1194.

Subscribed and sworn to before me this 21st day of September, 1911.

[SEAL.] (Sgd.) JUAN DE GUZMAN BENETIZ,
Notary Public.

11 District Court of the United States for the District of Porto Rico.

Filed October 3, 1911.

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff and defendant in the above entitled action that the trial of said action shall take place December 20th, 1911, subject to the convenience of this court. Trial by jury is hereby waived.

(Signed) ARMSTRONG & KEITH,
ETHAN W. JUDD,
Representative for Porto Rico,
Attorneys for the Plaintiff.

Office and Post Office address: San Juan, Porto Rico.

(Signed) FOSTER J. BROWN,
Attorney for Defendant.

San Juan, Porto Rico, October 3rd, 1911.

12 District Court of the United States for the District of Porto Rico.

Filed February 5, 1912.

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Order.

It is hereby ordered by the Court that leave be, and the same is, hereby given to said plaintiff, Fajardo Sugar Company, to file an amended complaint in the above entitled action, the amendments to which are as follows:

First. Paragraph I., line three, substitute "\$586,500.00" for \$589,000.00".

Second. Paragraph I., line eight, substitute "\$7,038.00" for "\$7,038.00".

Third. Paragraph I., line nine, substitute "\$7,038.00" for \$7,068.00".

Fourth. Paragraph I., line ten, substitute "\$586,500.00" for \$589,000.00".

Fifth. Paragraph I., Line one, page 2, substitute "\$3,519.00" for \$3,534.00".

Sixth. Paragraph I., line three, strike out "shares of stock of other corporations, to wit", and substitute "Five Thousand Eight hundred and sixty-five shares of".

13 Seventh. Paragraph II., line six, strike out "and" following "Connecticut" and add "which shares possess a par value of \$100 per share".

Eighth. Paragraph 11, lines 7, 8 and 9, strike out entire.

Dated this 5th day of Febr'y 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

14 In the District Court of the United States for the District of Porto Rico.

(Filed Feb. 5, 1912.)

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against

SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Order.

On reading and filing the proposed Supplemental Complaint and notice of this motion and on motion of Ethan W. Judd, for plaintiff, and no opposition being made

Ordered that the plaintiff have leave to make and file the proposed Supplemental Complaint herein and further that the service of said Supplemental Complaint heretofore may stand as the completed service thereof, and that the defendant have time to plead to said Supplemental Complaint until and including 5th, Febr'y, 1912.
Dated this 5th day of Febr'y, 1912.

[SEAL.] (Signed) PAUL CHARLTON, *Judge.*

15 District Court of the United States for the District of Porto Rico.

(Filed Feb. 5, 1912.)

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Amended Complaint.

The plaintiff, a corporation, duly organized under and by virtue of the laws of the State of New York, with its principal office and place of business at No. 106 Wall Street, City of New York, State of New York, and duly authorized to do business, as a foreign corporation, in the Island of Porto Rico with its local office in the Town of Fajardo, Porto Rico, and possessing the power to sue and be sued in all the Courts of said island, complains of the defendant, a resident of the Island of Porto Rico and a citizen of the United States, in his official capacity as present incumbent of the office of Treasurer of Porto Rico, and alleges:

I.

That the defendant assessed personal property belonging to the plaintiff for taxation in the fiscal year 1911-1912, in the amount of \$586,500.00, and, although the plaintiff duly protested to the defendant against said assessment as made, at the same time stating the grounds and reasons for making such protest, nevertheless and in spite of said protest and the reasons therefor, the defendant did fix and compute the taxes of the plaintiff on the property aforesaid in the amount of \$7,038.00, the said tax of \$7,038 being based and computed on the said assessed valuation of \$586,000.00 of the plaintiff's property as aforesaid, and the defendant did take steps to collect the same, whereupon the plaintiff on the eleventh day of September, 1911, paid to the defendant the first installment of the said tax, amounting to \$3,519.00, under protest which the defendant took and now retains.

II.

That the personal property so assessed consisted at the time of the assessment, computation and collection as aforesaid and does now consist of five thousand, eight hundred and sixty-five (5,865) shares of stock of the Fajardo Development Company, a corporation organized and existing under and by virtue of the laws of Connecticut, which shares possess a par value of \$100 per share.

III.

That said shares of stock were at all times mentioned herein, and are now, held by the plaintiff at its principal office in the state of its domicile, to wit: at 106 Wall Street, City of New York, State of New York; that all business relating to or in connection with said shares so held has at all times, and now is, transacted at the principal office of the plaintiff, as above described, and no business relating to or in connection with said shares of stock has been at any of the times mentioned herein, or now is, transacted within the Island of Porto Rico; and that said shares of stock were not at any of the times mentioned herein, nor are they now, situated within the Island of Porto Rico.

Wherefore the plaintiff demands judgment against the defendant that the amount of \$3,519.00 was wrongfully paid and ought to be refunded, together with interest from the time of payment of said amount and the costs and disbursements of this action.

17

(Sgd.)

ARMSTRONG & KEITH,

ETHAN W. JUDD,

*Representative for Porto Rico,**Attorneys for the Plaintiff.*

Office and Post Office Address, San Juan, Porto Rico.

ISLAND OF PORTO RICO,

District of Porto Rico, ss:

Arthur D. Paton, being duly sworn, says as follows:

I am an officer of the Fajardo Sugar Company, the plaintiff above named, to wit, the acting general manager.

I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe it to be true.

(Sgd.)

ARTHUR D. PATON.

Before me personally came and appeared Arthur D. Paton, of age, single, business man, and a resident of Fajardo, Porto Rico, to me known and known to me to be the same person who executed the foregoing verification, and he acknowledges that he so executed it for the purpose therein set forth.

Fajardo, P. R., this 29th day of Eunio, 1912.

(Sgd.)

LCDO CARLOS M. ROLA,

[SEAL.]

Notary Public.

Affidavit No. 8.

Revenue stamp in the value of \$1.00.

18 District Court of the United States for the District of Porto Rico.

(Filed Feb. 5, 1912.)

At Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
against
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Supplemental Complaint.

The plaintiff, for a proposed Supplemental Complaint, herein alleges:

I.

That the second and last installment of taxes, amounting to \$3,519.00, as fixed and computed by the defendant and assessed against personal property of the plaintiff for the fiscal year, 1911-1912, as more particularly alleged in plaintiff's Amended Complaint, fell due to be paid on January 1st, 1912, and that the plaintiff, on the 22nd day of January, 1912, paid to the defendant said second installment of said taxes, amounting to \$3,519.00, as aforesaid, under protest, which the defendant took and now retains.

II.

That the plaintiff has paid, under protest, and the defendant has taken and now retains, as alleged in plaintiff's Amended Complaint and as alleged herein, \$7,038.00, as taxes assessed, computed and collected by the defendant against personal property of the plaintiff.

III.

That the personal property, so assessed, consisted at the time of the assessment, computation and collection, as aforesaid, and 19 does now consist of the same five thousand eight hundred and sixty-five shares of the stock of the Fajardo Development Company, as more particularly alleged in plaintiff's Amended Complaint.

IV.

That said shares of stock were at all times mentioned herein, and are now, held by the plaintiff at its principal office in the state of its domicile, to wit: at 106 Wall Street, City of New York, State of New York; that all business relating to or in connection with said shares so held has at all times, and now is, transacted at the principal office of the plaintiff, as above described, and no business relating to or in connection with said shares of stock has been at any of the times mentioned herein, or is now, transacted within the

Island of Porto Rico; and that said shares of stock were not at any of the times mentioned, nor are they now, situated within the Island of Porto Rico.

Wherefore the plaintiff demands judgment against the defendant that the amount of \$7,068.00 was wrongfully paid and ought to be refunded, together with interest from the time of payment of said amounts and the costs and disbursements of this action.

(Sgd.)

ARMSTRONG & KEITH,

ETHAN W. JUDD,

Representative for Porto Rico,

Attorneys for the Plaintiff.

Office and Post Office address: San Juan, Porto Rico.

ISLAND OF PORTO RICO,

District of Porto Rico, ss:

Jorge Bird Arias, being duly sworn, says as follows:

I am an officer of the Fajardo Sugar Company, the plaintiff above named, to wit, the general manager.

20 I have read the foregoing complaint, and know the contents thereof, and the same is true of my own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters I believe it to be true.

(Sgd.)

JORGE BIRD ARIAS.

Before me personally came and appeared Jorge Bird Arias, of are, married, business man, and a resident of Fajardo, Porto Rico, to me known and known to me to be the same person who executed the foregoing verification, and he acknowledges that he so executed it for the purpose therein set forth.

Fajardo, Porto Rico, this 29th day of Eunio, 1912.

(Sgd.)

LCDO CARLOS M. ROLA,

[SEAL.]

Notary Public.

Affidavit No. 7.

Revenue stamp of the value of \$1.00.

21 In the District Court of the United States for Porto Rico.

(Filed February 19, 1912.)

Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,

vs.

SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Answer to Supplemental Complaint.

Comes now Allan H. Richardson, the duly appointed, qualified and acting Treasurer of Porto Rico, and for answer to the supplemental complaint filed herein, alleges as follows:

I.

Defendant denies each and every allegation contained in Paragraph I of plaintiff's supplemental complaint.

II.

Defendant denies each and every allegation contained in Paragraph II of Plaintiff's supplemental complaint.

III.

Defendant denies each and every allegatioan contained in Paragraph III of plaintiff's supplemental complaint.

IV.

Defendant denies each and every allegation contained in paragraph IV of plaintiff's supplemental complaint.

22 And Defendant, further answering and by way of defense to the supplemental complaint filed herein, alleges as follows:

I.

That on or about the 12th day of April, 1905, the above named plaintiff, Fajardo Sugar Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, filed with the Secretary of Porto Rico a duly certified copy of its articles of incorporation, including consent to be sued and designation and acceptance of agent, and was thereupon registered in the Office of the Secretary of Porto Rico as a foreign corporation.

II.

That thereafter said above named Plaintiff was duly and regularly licensed by the Treasurer of Porto Rico to engage in the business of growing and grinding sugar cane in all of its branches within the Island of Porto Rico, and to engage in the business of holding, purchasing, acquiring and selling, assigning and transferring, or otherwise disposing of, the shares of capital stock, bonds, etc., of other corporations, and to exercise all of the rights and privileges of ownership, etc.

III.

That the said Fajardo Sugar Company, a corporation, has since the — day of —, 19—, been engaged in, and is still engaged in, the growing and grinding of sugar cane, in all of its 23 branches, exclusively within the Island of Porto Rico, and has its principal place of business within said Island in the city of Fajardo.

IV.

That under its articles of incorporation and license issued by the Treasurer of Porto Rico, the said Fajardo Sugar Company is authorized to engage in the growing and grinding of sugar cane, in all of its branches, and to engage in the business of holding, purchasing, acquiring and selling, assigning and transferring, or otherwise disposing of, shares of capital stock, bonds, etc., of other corporations, and to exercise all of the rights and privileges of ownership, etc.

V.

That in pursuance of said authority contained in said articles of incorporation, and as an incident to the business being conducted in Porto Rico, the said Company did acquire, out of the funds of its capital, 5,865 shares, of the par value of \$100.00 each, amounting to the sum of \$586,500.00, of the Fajardo Development Company, a corporation created and organized and existing under and by virtue of the laws of the State of Connecticut, and which said Fajardo Development Company is authorized to do business in Porto Rico, and is, and has been, engaged exclusively in business within said Island.

VI.

That the shares of stock of the Fajardo Development Company so purchased by the Fajardo Sugar Company, as aforesaid, constitute a part and parcel of the capital of the Fajardo Sugar Company a corporation, which is employed in the transaction of business within the Island of Porto Rico.

VII.

That the Fajardo Sugar Company, a corporation, is engaged exclusively in the transaction of business within the Island of Porto Rico, and conducts and carries on no other business except that which is authorized by its articles of incorporation.

VIII.

That during the fiscal year 1911-12 Plaintiff herein, the Fajardo Sugar Company, a foreign corporation, had employed in the transaction of business within the Island of Porto Rico capital in the sum of \$2,363,000.00, upon which it was liable to taxation under the laws of Porto Rico.

IX.

That the defendant, Samuel D. Gromer, in his official capacity of Treasurer of Porto Rico, caused to be duly assessed for purposes of taxation for the fiscal year of 1911-12 the capital of the Fajardo Sugar Company, a corporation, in the amount of \$2,633,006.00; part of which capital, to the amount of \$586,500.00, consisted of shares of stock owned by the said Fajardo Sugar Company in the Fajardo Development Company, of which assessment the Plaintiff

was duly and regularly notified, and thereafter, on the 21st day of August, 1911, in pursuance of said notification of assessment, the said Plaintiff, through counsel, appeared before the duly and regularly constituted Board of Review & Equalization with the object and purpose of securing the elimination of \$586,500.00, the amount of capital of the Fajardo Sugar Company represented by the shares of stock in the Fajardo Development Company, from the assessment for the fiscal year 1911-12.

X.

That after a full and complete hearing of said application for the elimination of said sum of \$586,500.00 from the assessment of capital of the Fajardo Sugar Company, represented by shares of stock of the Fajardo Development Company, from said assessment, the said Board of Review & Equalization, on the date named, made a finding sustaining the assessment theretofore made under the order and direction of the Treasurer of Porto Rico, on the ground that the amount represented by the shares of the Fajardo Development Company was capital actually invested in Porto Rico and capital actually employed by the Fajardo Sugar Company in the transaction of business within the Island of Porto Rico.

XI.

That the amount of taxes fixed and computed by the Defendant, Samuel D. Gromer, upon the amount of capital of the Fajardo Sugar Company represented by the shares of stock owned by the Fajardo Sugar Company of the Fajardo Development Company amounted to the sum of \$7,038.00.

Wherefore, defendant prays that the complaint of plaintiff be dismissed, and that defendant may have judgment for costs.

(Sgd.)

FOSTER V. BROWN,
Attorney General of Porto Rico and
Attorney for Defendant.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

Allan H. Richardson, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting Treasurer of Porto Rico; that he has read the foregoing answer and knows the contents thereof, and the same is true of his own knowledge, except as to those matters and things alleged, on information and belief, and as to those matters he believes them to be true.

(Sgd.)

ALLAN H. RICHARDSON.

Sworn to and subscribed before me by Allan H. Richardson, of legal age, Treasurer of Porto Rico, and resident of San Juan, personally known to me, this 17th day of February, 1912.

[SEAL.] (Sgd.) JUAN DE GUZMAN BENETIZ,

Notary Public.

No. 1972.

27 In the District Court of the United States for Porto Rico.
(Filed February 19, 1912.)

Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Answer to Amended Complaint.

Comes now Allan H. Richardson, the duly appointed, qualified and acting Treasurer of Porto Rico, and for answer to the amended complaint filed herein, alleges as follows:

I.

Defendant denies each and every allegation contained in paragraph I of plaintiff's amended complaint.

II.

Defendant denies each and every allegation contained in paragraph II of plaintiff's amended complaint.

III.

Defendant denies each and every allegation contained in paragraph III of plaintiff's amended complaint.

And defendant, further answering and by way of defense to the amended complaint filed herein, alleges as follows:

28

I.

That on or about the 12th day of April, 1905, the above named plaintiff, Fajardo Sugar Company, a corporation duly organized, created and existing under and by virtue of the laws of the State of New York, filed with the Secretary of Porto Rico a duly certified copy of its articles of incorporation, including consent to be sued and designation and acceptance of agent, and was thereupon registered in the Office of the Secretary of Porto Rico as a foreign corporation.

II.

That thereafter said above named plaintiff was duly and regularly licensed by the Treasurer of Porto Rico to engage in the business of growing and grinding sugar cane in all of its branches within the Island of Porto Rico, and to engage in the business of holding, purchasing, acquiring and calling, assigning and transferring, or otherwise disposing of, the shares of capital stock, bonds, etc., of

other corporations, and to exercise all of the rights and privileges of ownership, etc.

III.

That the said Fajardo Sugar Company, a corporation, has since the — day of —, 19—, been engaged in, and is still engaged in, the growing and grinding of sugar cane, in all of its branches, exclusively within the Island of Porto Rico, and has its principal place of business within said Island in the city of Fajardo.

IV.

That under its articles of incorporation and license issued by the Treasurer of Porto Rico, the said Fajardo Sugar Company is authorized to engage in the growing and grinding of sugar cane, in all of its branches, and to engage in the business of holding, purchasing, acquiring and selling, assigning and transferring, or otherwise disposing of, shares of capital stock, bonds, etc., of other corporations, and to exercise all of the rights and privileges of ownership, etc.

V.

That in pursuance of said authority contained in said articles of incorporation, and as an incident to the business being conducted in Porto Rico, the said Company did acquire, out of the funds of its capital, 5,865 shares, of the par value of \$100.00 each, amounting to the sum of \$586,500.00, of the Fajardo Development Company, a corporation created and organized and existing under and by virtue of the laws of the State of Connecticut, and which said Fajardo Development Company is authorized to do business in Porto Rico, and is, and has been, engaged exclusively in business within said Island.

VI.

That the shares of stock of the Fajardo Development Company, so purchased by the Fajardo Sugar Company, as aforesaid, constitute a part and parcel of the capital of the Fajardo Sugar Company, a corporation, which is employed in the transaction of business within the Island of Porto Rico.

VII.

That the Fajardo Sugar Company, a corporation, is engaged exclusively in the transaction of business within the Island of Porto Rico, and conducts and carries on no other business except that which is authorized by its articles of incorporation.

VIII.

That during the fiscal year 1911-1912 plaintiff herein, the Fajardo Sugar Company, a foreign corporation, had employed in the transaction of business within the Island of Porto Rico capital in the sum of \$2,333,006.00, upon which it was liable to taxation under the laws of Porto Rico.

IX.

That the defendant, Samuel D. Gromer, in his official capacity of Treasurer of Porto Rico, caused to be duly assessed for purposes of taxation for the fiscal year 1911-1912 the capital of the Fajardo Sugar Company, a corporation, in the amount of \$2,363,003.00, part of which capital, to the amount of \$586,500.00, consisted of shares of stock owned by the said Fajardo Sugar Company in the Fajardo Development Company, of which assessment the plaintiff was duly and regularly notified; and thereafter, on the 21st day of August, 1911, in pursuance of said notification of assessment, the said plaintiff, through counsel, appeared before the duly and regularly constituted Board of Review & Equalization with the object and purpose of securing the elimination of \$586,500.00, the amount of capital of the Fajardo Sugar Company represented by the shares of stock in the Fajardo Development Company, from the assessment for the fiscal year 1911-12.

X.

31 That after a full and complete hearing of said application for the elimination of said sum of \$586,500.00 from the assessment of capital of the Fajardo Sugar Company, represented by shares of stock of the Fajardo Development Company, from said assessment, the said Board of Review and Equalization, on the date named, made a finding sustaining the assessment theretofore made under the order and direction of the Treasurer of Porto Rico, on the ground that the amount represented by the shares of the Fajardo Development Company was capital actually invested in Porto Rico and capital actually employed by the Fajardo Sugar Company in the transaction of business within the Island of Porto Rico.

XI.

That the amount of taxes fixed and computed by the Defendant, Samuel D. Gromer, upon the amount of capital of the Fajardo Sugar Company represented by the shares of stock owned by the Fajardo Sugar Company of the Fajardo Development Company amounted to the sum of \$7,038.00.

Wherefore, defendant prays that the complaint of plaintiff be dismissed, and that defendant may have judgment for costs.

(Sgd.)

FOSTER V. BROWN,
Attorney General of Porto Rico and
Attorney for Defendant.

UNITED STATES OF AMERICA,
Island of Porto Rico, ss:

Allan H. Richardson, being first duly sworn, on oath deposes and says: That he is the duly appointed, qualified and acting Treasurer of Porto Rico; that he has read the foregoing answer
32 and knows the contents thereof, and the same is true of his own knowledge, except as to those matters and things alleged

on information and belief, and as to those matters he believes them to be true.

(Sgd.)

ALLAN H. RICHARDSON.

No. 1971.

Sworn to and subscribed before me by Allan H. Richardson, of legal age, Treasurer of Porto Rico, and resident of San Juan, personally known to me, this 17th day of February, 1912.

[SEAL.] (Sgd.) JUAN DE GUZMAN BENETIZ,
Notary Public.

33 In the District Court of the United States for Porto Rico.

Filed May 29th, 1912.

Law. No. 818.

FAJARDO SUGAR COMPANY, a Corporation, Plaintiff,
vs.
SAMUEL D. GROMER, Treasurer of Porto Rico, Defendant.

Motion to Dismiss.

Comes now Allan H. Richardson, the Treasurer of Porto Rico, by Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, his attorney, and moves to dismiss the complaint in the above entitled action, on the ground that this Honorable Court has no jurisdiction of the subject matter of the said suit, and that, upon the pleadings filed therein and upon the law, the defect in the jurisdiction of the said Court is manifest.

(Signed)

WOLCOTT H. PITKIN, Jr.,
Attorney General of Porto Rico,
Attorney for Defendant.

34 In the District Court of the United States for Porto Rico.

Filed June 10, 1912.

At Law. No. 818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.
ALLAN RICHARDSON, as Treasurer of Porto Rico.

Stipulation.

It is hereby stipulated and agreed by and between the attorneys for the plaintiff in the above entitled action and the Attorney General of Porto Rico for the defendant in the above entitled action.

First. That Allan H. Richardson, as Treasurer of Porto Rico, be and hereby is substituted as party defendant for Samuel D. Gromer, as Treasurer of Porto Rico, against whom this action was originally instituted in his said representative capacity as Treasurer of the Island of Porto Rico, said Samuel D. Gromer having resigned and said Allan H. Richardson being his successor in office and the present incumbent thereof.

Second. That the hearing on the motion of defendant to dismiss this action be adjourned to the first Monday of July, 1912, subject to the convenience of the court.

Third. That the trial of this action shall be adjourned to the second Monday of November, 1912, subject to the approval and convenience of the Court.

(Signed)

ARMSTRONG & KEITH,
ETHAN W. JUDD,
Representative for Porto Rico,
Attorneys for Plaintiff.

(Signed)

W. H. PITKIN, JR.,
Attorney for Defendant.

San Juan, Porto Rico, June 10th, 1912.

35 In the District Court of the United States for Porto Rico.

At Law. 818.

THE FAJARDO SUGAR COMPANY
v.
THE TREASURER OF PORTO RICO.

Journal Entry of Aug. 6, 1912.

The Petition to dismiss the above entitled cause for lack of jurisdiction, which was held in abeyance for further consideration, is now denied according to law, to which action of the Court defendant duly objects and excepts.

36 In the District Court of the United States for Porto Rico.

Filed April 10, 1913.

At Law. No. 818.

THE FAJARDO SUGAR COMPANY, a Corporation, Plaintiff,
vs.
ALLAN H. RICHARDSON, as Treasurer of Porto Rico (Substituted for
Samuel D. Gromer), Defendant.

Motion to Dismiss.

Now comes Allan H. Richardson, Treasurer of Porto Rico, the above named defendant, by Wolcott H. Pitkin, Jr., Attorney Gen-

eral of Porto Rico, his attorney, and respectfully moves to dismiss the complaint, the amended complaint and the supplemental complaint in the above entitled action, upon the ground and for the reason that this Honorable Court has no jurisdiction of the subject matter of the said action, for the following reasons:

1. The complaint, amended complaint and supplemental complaint, filed herein, although alleging a cause of action against this defendant, the Treasurer of Porto Rico as aforesaid, as an individual, in reality and in contemplation of law allege and set forth a cause of action against the People of Porto Rico.

2. That the People of Porto Rico are and constitute a sovereign body politic, and cannot be sued in this Honorable Court without its consent.

3. No consent has been given by the People of Porto Rico to be sued in this Honorable Court in respect to the alleged cause of action set forth in said complaint, amended complaint and supplemental complaint filed herein.

(Signed) WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Defendant.

38 In the District Court of the United States for Porto Rico,
June 26th, 1913.

At Law. #818.

FAJARDO SUGAR COMPANY

vs.

TREASURER OF PORTO RICO.

(Entry.)

The motion to dismiss the above entitled cause for lack of jurisdiction, which was held in abeyance for further consideration is now denied according to the opinion given on this day.

Journal, September 25, 1913.

At Law. #818.

THE FAJARDO SUGAR COMPANY

vs.

THE TREASURER OF PORTO RICO.

The motion to dismiss for lack of jurisdiction, filed by the defendant in the above entitled cause, which was submitted to the Court for its consideration, is now denied according to the opinion given on this day, to which action of the Court, the defendant by its attorney, The Attorney General of Porto Rico, duly objects and excepts. This order is entered herein, nunc pro tunc of June 26, 1913.

39 In the District Court of the United States for Porto Rico.

No. 818. Law.

FAJARDO SUGAR COMPANY

v.

ALLAN H. RICHARDSON.

San Juan.

Armstrong & Keith, Ethan W. Judd and Chas. Hartzell for Plaintiff.

Daniel Day Walton, Jr., Acting Attorney General, for Defendant.

HAMILTON, J.:

This suit relates to taxes assessed for the years 1911 and 1912 on personal property of the plaintiff and paid by the plaintiff under protest. The bill was filed to recover back this payment by proceedings provided by the laws of Porto Rico, and to the bill the defendant filed answers. Afterwards defendant moved to dismiss the complaint upon the ground of lack of jurisdiction, and this motion was denied by my predecessor on August 6, 1912. Subsequently, the Supreme Court of the United States reversed the decision of The People of Porto Rico v. Rosaly, originally decided by the Supreme Court of Porto Rico in 16 P. R. R. 481. The purport of the decision of the United States Supreme Court was that The People of Porto Rico could not be sued without their consent. People of Porto Rico v. Rosaly, 227 U. S. 270. In consequence of this decision, the defendant refiled his motion to dismiss for lack of jurisdiction, and thereupon the plaintiff filed a counter motion to strike the defendant's motion from the files.

1. The point is raised that the defendant's motion to dismiss for want of jurisdiction cannot be considered because it was filed without consent of court. This is technically correct, but in order to get at the merits of the matter, the consent of the court to the filing of such motion is hereby given.

40 2. The question next arises whether the defendant has not submitted to the jurisdiction of the court by appearing and filing an answer. This would seem to be the law. A party cannot be permitted to blow hot and cold, to appear so far as it is advantageous to him and to withdraw his appearance when it ceases to be so. The appearance was by the Treasurer of Porto Rico in his own name and by the Attorney General of Porto Rico representing the defendant for all purposes. It would seem true also that if the defendant was ever in court, as cannot be disputed, he is now while making his present motion. It is true there are cases holding that an official cannot waive the rights of a State by appearing in a suit, but this is not one of such cases. Adams v. Bradley, Fed. case No. 48; Case v. Terrell, 11 Wall. 199, 202; United States v. Lee, 106 U. S. 196, 205.

3. There is no doubt that the question of jurisdiction can be raised at any time, and even in the same case after it has once been passed on. *Sheldon v. Wabash R. R.*, 105 F. R. 785; *First National Bank v. Title Company*, 198 U. S. 280.

4. The point of jurisdiction sought to be raised by the motion to dismiss is that under the case of *The People of Porto Rico v. Rosaly*, 227 U. S. 270, The People of Porto Rico are a sovereign and cannot be sued. This is an important question and should receive consideration.

The principle that a State cannot be sued without its consent is as old as the first amendment to the Constitution and needs no consideration. It is undisputed, however, that The People of Porto Rico do not constitute a State in any sense of the word.

The same principle has been extended, however, by the 41 decisions of the Supreme Court of the United States to Territories as matter of public policy. These entities which are States in the making, have been held to have enough of the attributes of sovereignty to make it improper to subject them to suit, and in a case where The People of Porto Rico were sued by name it has been held in the Rosaly case that they constitute pro tanto a Territory.

The position of Porto Rico has been gradually evolved by a series of decisions. The first was the Customs Cases against Downes, 182 U. S. 244, and others of that series. These decide that the United States can acquire territory which is not incorporated into the Union. In other words, that while the United States are an indivisible union of indestructible States for domestic purposes, they constitute as to foreign affairs a nation capable of holding possessions, like Great Britain or any other country. By the Treaty of Paris signed in September, 1898, and proclaimed the next year, the United States acquired Porto Rico without any obligation, as in the case of Louisiana and Florida, of incorporating it at any time into the Union of States. The Republic of Hawaii had been annexed a short time previously, on July 7, 1898 (23 Stats. at L. 750). An Act for its government expressly calling it, in Sec. 2, a Territory, was passed on April 30, 1900, (31 Stats. at L. 141).

It has been held that the Constitution of the United States does not ipso facto follow the flag, but it requires some affirmative act of the legislative branch of the government to extend the Constitution to new possessions. In the case of Hawaii this was done by Sec. 5 of the above Act. *Hawaii v. Mankichi*, 190 U. S. 197. The Organic

Act for the Government of Porto Rico, however, passed but a 42 few days before that of Hawaii, used the term territory in defining the status of Porto Rico. This is known as the Foraker Act of April 12, 1900 (31 Stats. at L. 37).

It is true that the Supreme Court has on more than one occasion referred to Porto Rico as, for some purposes, a territory. *Gromer v. Standard Dredging Company*, 224 U. S. 362. And lately in the case of the American Railroad Company v. Didricksen, 227 U. S. 145. These decisions, however, must be taken, not as establishing any particular rule, which is not before the court, but as limited to

the facts of the particular case. Porto Rico, apart from its not being incorporated into the United States, and being unlike technical Territories, an island at a distance from the mainland of the United States, is not organized on the basis of the technical Territories heretofore known. None of its officials are elected by the people of Porto Rico, while, on the other hand, its local courts, unlike those of Territories, have no jurisdiction over Federal matters. In respect to courts, Porto Rico is more like a State than a Territory. The Federal Court has even greater jurisdiction than the Federal District Courts in the United States proper, inasmuch as any American citizen can use it, and the jurisdictional amount is one thousand dollars, which is less than in the United States proper. Organic Act, See. 34 and subsequent amendments.

Upon the whole, Porto Rico is much more in the nature of a dependent State external to the United States, and corresponding to what are called possessions of the British Crown, more than to a technical Territory of the United States.

It is probably true, however, that this makes no material
43 difference in the rule that within its limits Porto Rico constitutes a government, and as a government is exempt from suit in its own name. The material question is to see how far this applies to the case at bar.

5. The suit at bar is not one against Porto Rico by name. The question arises, does a suit against the Treasurer constitute a suit against Porto Rico?

It is undoubtedly true that it is not necessary, in order to make a suit one against the sovereign, that the sovereign be made a party by name. A State, like any other corporation, can only act through officers, and when an affirmative suit is brought against the appropriate officers, it is just as much against the sovereign as if the sovereign had been named *eo nomine*. *Fitts v. McGhee*, 172 U. S. 516; *In Re Ayers*, 123 U. S. 443.

A suit against officers is permissible where they are acting under a void statute of the State, because in that case there is in the eyes of the law no statute, and the officers can therefore be restrained. *Virginia Coupon Cases*, 114 U. S. 270. In the case at bar there is no invalid statute in question. The suit is designed to compel the Treasurer of Porto Rico to carry out his duties under what may be assumed to be a valid statute. It is not evident in what respect this is a suit against The People of Porto Rico.

6. There is no question that a sovereignty, whatever may be its nature, can waive its non-liability to suit. This can be done only in pursuance to a law passed by the law making body, and, in the case at bar there has been a law passed on the subject. This is the Act of March 9, 1911, Laws of 1911, p. 124, Secs. 3, 4 and 5 of which are as follows:

44 "SEC. 3. Be it further enacted that, the party paying said revenue under protest may, at any time within thirty days after making said payment, and not longer thereafter, sue the said Treasurer for said sum, for the recovery thereof, in the court having competent jurisdiction thereto; and if it be determined that the same

s wrongfully collected, as not being due from said party to the government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

SEC. 4. Be it further enacted that, there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue, illegally.

SEC. 5. Be it further enacted that, no writ for the prevention of collection of any revenue claimed, or to hinder and delay the collection of the same, shall in anywise issue, either supersedeas, injunction, or any other writ or process whatever; but in all cases which, for any reason, any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other."

The question arises therefore as to a proper construction of the provision "a court of competent jurisdiction". It is argued on the one side that this must be presumed to refer only to local courts, the other side must be considered as a whole, and that the remedy by appeal to the Supreme Court in Sec. 3 shows that reference is had only to insular courts.

There seems to be no question that a sovereign can limit its consent to be sued to its own courts, especially as to tax cases. *Smith v. Reeves*, 178 U. S. 436, 445; *Beers v. Arkansas*, 61 U. S. 527, 529. It has even been held that consent to be sued in a local court does not carry with it the consent to have the same suit brought in a Federal Court. *Murray v. Wilson Distilling Company*, 213 U. S. 172.

Such a limitation, however, must clearly appear. This Court is not going to force construction of a matter in order to deprive itself of jurisdiction. In the *Reeves* case it was expressed that the suit should be brought in a State court in Sacramento County, which necessarily excluded any other court. In the case at bar, however, the suit is to be brought in any court of competent jurisdiction, and this court is not going to assert that it is not a court of competent jurisdiction.

It is further urged in this regard that the procedure provided is not a suit in any proper sense of the word, because not enabled by a judgment, and so is not within the powers of this Court. *Gordon v. United States*, 117 U. S. 697.

It may be questioned, however, whether the statute at bar goes far. It directs the Treasurer to keep as a separate fund the money paid under protest, and, after certificate from the proper court, "the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury." This court will not assume that the Treasurer will not do his duty, and will not now discuss the question of what would be the remedy in case he did so. While the proceeding is a peculiar one, it is not clear that not a judgment to all intents and purposes.

"In general the office of the judgment is fully performed when it declares and adjudicates the existence or non-existence of the liability sought to be established; it is not concerned with the means of authorizing the liability declared; although it adjudges that the one party 'have and recover' a certain sum from the other, it is not necessary that it should command the debtor to pay the money, or authorize or direct the issue of an execution, or that it should be served on any party to the cause after it is entered or filed.

No judgment is final which does not determine the rights of the parties in the cause and preclude further inquiry as to their rights in the premises. But it is not essential if the judgment be final that it should establish all the rights existing between parties to the suit; all that is required is that it should determine the issues involved in the action; and the judgment is none the less final because some future orders of the court may become necessary to carry it into effect." 23 Cyc. 689; 1 Black on Judgments, Sec. 43.

46 8. Upon the whole therefore it does not appear that the motion to dismiss for want of jurisdiction should prevail. Any other construction of the Act than the one above expressed would remove from American citizens the protection of Federal Courts and leave them at the discretion of the insular authorities. It is not to be presumed that the insular authorities would do injustice, but it is also true that the object of a Federal Court is to afford all constitutional protection to American citizens and to foreigners having financial interests in the locality in question, whether it be an organized State of the Union or an insular possession like Porto Rico. The conclusion arrived at therefore seems to be supported by sound public policy and also by the fact that if a suit was brought in the local courts under this Act, which affected an American citizen or a foreigner, it could on motion be removed to the Federal Court. Entertaining jurisdiction in the first instance merely prevents this circuity of action.

The motion to dismiss the complaint for lack of jurisdiction is therefore denied, and that to strike that motion from the files is also denied because unnecessary in the view taken by the Court.

San Juan, P. R., June 26, 1913.

(Signed)

PETER J. HAMILTON, *Judge.*

47 In the District Court of the United States for Porto Rico.

November 8, 1913 (Entry).

At Law. #818.

FAJARDO SUGAR COMPANY
vs.
TREASURER OF PORTO RICO.

Upon motion of Louis Banigan his appearance is entered as attorney for plaintiff to substitute Ethan W. Judd.

48 In the District Court of the United States for Porto Rico.

Journal Entry, July 6, 1914.

At Law. #818.

THE FAJARDO SUGAR COMPANY
vs.
THE TREASURER OF PORTO RICO.

This cause is called for trial the parties in the case having heretofore filed their Stipulation that the case be tried by the Court without a Jury. Come the parties by their attorneys and the defendant files a motion objecting to any further proceedings and praying for the dismissal of the cause on the ground that the court has no jurisdiction over the defendant, which motion is denied by the court and the defendant duly excepts. Whereupon the parties file a Stipulation of facts and argue the case to the Court. At the close of the trial the Plaintiff moves for a judgment in his favor in the sum of \$7,038.00 without interest or costs, and the defendant likewise moves for judgment in its favor. The Court denies defendant's motion, to which action of the Court in denying the motion, said defendant duly excepts. The defendant renews its motion to dismiss the cause for want of jurisdiction which action is likewise denied by the Court and Exception taken by defendant.

The Court having duly considered the matter renders its opinion rendering judgment in favor of the plaintiff.

Judgment.

It is therefore considered and adjudged by the Court that the Plaintiff herein the Fajardo Sugar Company do have and recover from the defendant Allan H. Richardson, as Treasurer of Porto Rico, the sum of \$7,038.00, without interest or costs and that execution may issue therefor. Defendant duly enters its Exceptions to the Judgment herein.

50 In the District Court of the United States for Porto Rico.

Filed July 6, 1914.

Law. No. 818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Motion.

The above entitled case having been called for trial, comes now the defendant, Allan H. Richardson, as Treasurer of Porto Rico, by his Attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, and objects to further proceedings in the case on the ground that the court has no jurisdiction over the defendant; and moves the court that the above entitled cause be dismissed for want of jurisdiction over the defendant, in that the suit though in form against the Treasurer of Porto Rico is in reality against the People of Porto Rico; The People of Porto Rico is not subject to suit without its consent, and consent has not been given to suit in this case.

San Juan, Porto Rico, July 6, 1914.

(Signed)

WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for Defendant.

51 In the District Court of the United States for Porto Rico.

Filed July 6, 1914.

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Motion.

Comes now the defendant in the above entitled cause, Allan H. Richardson, as Treasurer of Porto Rico, by his attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, at the close of the proceedings on the trial of the said cause, and moves the court for judgment in his favor and against the plaintiff for costs.

(Signed)

WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Defendant.

52 In the District Court of the United States for Porto Rico.

Filed July 6, 1914.

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
v.
ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Motion.

Comes now the defendant in the above entitled cause, Allan H. Richardson, as Treasurer of Porto Rico, by his Attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, at the close of the proceedings on the trial of the said cause, and moves the Court that the said cause be dismissed for want of jurisdiction over the defendant, in that the complaint, though in form against the Treasurer of Porto Rico as an individual, is in reality and in contemplation of law against The People of Porto Rico; The People of Porto Rico is not subject to suit without its consent; and its consent to suit has not been given in this case.

(Signed)

WOLCOTT H. PITKIN, JR.,
Attorney General of Porto Rico,
Attorney for the Defendant.

53 In the District Court of the United States for Porto Rico.

(Filed July 7th, 1914.)

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
v.
ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Petition for Writ of Error and Supersedeas.

To the Honorable Peter J. Hamilton, Judge of the District Court of the United States for Porto Rico:

Allan H. Richardson, as Treasurer of Porto Rico, defendant in the above entitled cause, feeling himself aggrieved by the judgment rendered against him therein on the 6th day of June, 1914, comes now by his attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, and says that in the judgment and proceedings had prior thereto in this cause, certain errors were committed to the prejudice of this defendant, all of which will appear in more detail from the assignment of errors which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Honorable Supreme Court of the United States for the correction of the errors so complained of; and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, under and according to the laws of the United States in that behalf made and provided; and that all further proceedings in this court be suspended and stayed until the determination of said writ of error by the United States Supreme Court.

(Signed)

WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Deft.

54 In the District Court of the United States for Porto Rico.

(Filed July 7th, 1914.)

Law. No. 818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Assignment of Errors.

Afterwards, to wit, on the 7th day of June, in the year of our Lord, nineteen hundred and fourteen, comes Allan H. Richardson, as Treasurer of Porto Rico, by Wolcott H. Pitkin, Jr., Attorney General of Porto Rico and appellant's attorney, and says: that in the record, proceedings, decision and final judgment in the above entitled matter there is manifest error, in this, to wit:

1. The Court erred in denying defendant's motion to dismiss for want of jurisdiction, and in failing to dismiss for want of jurisdiction.

2. The Court erred in entertaining jurisdiction of the above entitled cause, because the suit though in form against the Treasurer of Porto Rico is in substance against The People of Porto Rico; The People of Porto Rico is not subject to suit without its consent; and it has not given its consent to be defendant in this suit.

3. The Court erred in regarding Act #35, approved Mar. 9, 1911 (1911 Laws of P. R. p. 124), providing for suit against the Treasurer of Porto Rico for the Recovery of taxes "in the court having competent jurisdiction," specifically providing that "Either

55 party to said suit shall have the right to appeal to the Supreme Court," as consent to suit in the District Court of the United States for Porto Rico, since there is no right of appeal from the District Court of the United States for Porto Rico to the Supreme Court of Porto Rico.

4. The Court erred in entering judgment against the defendant.

5. The Court erred in denying defendant's motion for judgment in favor of the defendant.

Wherefore, the plaintiff in error prays that the judgment of the District Court of the United States for Porto Rico in said cause be reversed, and the cause remanded to the said Court with directions to dismiss for want of jurisdiction.

(Signed)

WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Plaintiff in Error.

56-58 In the District Court of the United States for Porto Rico.

(Filed July 7th, 1914.)

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
v.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Upon motion of Wolcott H. Pitkin, Jr., Attorney General of Porto Rico and attorney for the defendant, and upon filing a petition for a writ of error and an assignment of errors,

It is ordered that a writ of error be and is hereby allowed to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and it is ordered that all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States; and, the plaintiff having given its consent, the defendant shall not be required to file any bond or other security for the due prosecution of the said writ of error.

(Signed)

[SEAL.]

P. J. HAMILTON,

Judge of the District Court of the

United States for Porto Rico.

59-60 In the District Court of the United States for Porto Rico.

(Filed July 7th, 1914.)

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
v.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Motion.

Comes now Allan H. Richardson, as Treasurer of Porto Rico, the defendant herein, by his attorney, Wolcott H. Pitkin, Jr. Attorney General of Porto Rico, and moves the court for an order extending the time for the signing, allowance and filing of the bill of excep-

tions herein, and extending the time in which to file in the Supreme Court of the United States transcript of record in the above entitled cause, up to and including the fifteenth day of November, 1914.

(Signed)

WOLCOTT PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Defendant.

61 In the District Court of the United States for Porto Rico.

(Filed July 7th, 1914.)

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,

v.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Order Enlarging Time for Filing Bill of Exceptions and Transcript.

This day came the defendant and made application for an order extending the time for the signing, allowance and filing of the bill of exceptions herein, and for an extension of the time in which to file the transcript herein in the Supreme Court of the United States, and cause being shown therefor and the plaintiff, The Fajardo Sugar Company, by its attorney, Louis A. Banigan, consenting thereto, such application is granted, and it is ordered that the time heretofore granted for the signing, allowance and filing of the bill of exceptions and the filing of the said transcript in the said Supreme Court of the United States, be and the same is hereby extended up to and including the 15th day of November, 1914.

Date July 7, 1914.

(Signed)

[SEAL.]

PETER J. HAMILTON,

*Judge of the District Court of the
United States for Porto Rico.*

62 In the District Court of the United States for Porto Rico.

Law. No. 818.

FAJARDO SUGAR COMPANY, a Corporation, Plaintiff,

vs.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Præcipe for Record.

To the Clerk of the Above Entitled Court:

In accordance with the order of the Judge of the above entitled court, made and entered on the seventh day of July, 1914, allowing a writ of error to the Supreme Court of the United States, on be-

half of the above named defendant, you are hereby directed to prepare a duly authenticated transcript of the record, proceedings, minute orders, and papers, in the above entitled cause, as follows:

- (1) The complaint filed September 12, 1911;
- (2) Answer filed September 21, 1911, omitting exhibits;
- (3) Stipulation waiving jury trial, of October 3, 1911;
- (4) Order allowing filing of amended complaint, of February 5, 1912;
- (5) Order allowing filing of supplemental complaint, of February 5, 1912;
- (6) Amended complaint, February 5, 1912;
- (7) Supplemental complaint, February 5, 1912;
- 63 (8) Answer to amended complaint, filed February 19, 1912;
- (9) Answer to supplemental complaint, filed February 19, 1912;
- (10) Motion by defendant to dismiss complaint for want of jurisdiction, filed May 29, 1912;
- (11) Stipulation substituting Allan H. Richardson as Treasurer of Porto Rico as defendant, filed June 10, 1912;
- (12) Order denying motion to dismiss and exception by defendant, of August 6, 1912;
- (13) Motion by defendant to dismiss for want of jurisdiction, filed April 10, 1913;
- (14) Order denying motion to dismiss, June 26, 1913; and exception thereto, September 25, 1913, by consent, as of June 26, 1913;
- (15) Opinion of court upon motion to dismiss, June 26, 1913;
- (16) Order entering name of Louis Banigan as attorney for plaintiff, November 13, 1913;
- (17) Order for beginning trial, July 6, 1914;
- (18) Motion by defendant to dismiss for want of jurisdiction, filed July 6, 1914;
- (19) Order denying motion to dismiss, and exception by the defendant, July 6, 1914;
- (20) Motion by defendant for judgment, July 6, 1914;
- (21) Order of court denying motion, and exception by defendant, July 6, 1914;
- (22) Motion by defendant for dismissal for want of jurisdiction, July 6, 1914;
- (23) Order of court denying motion, and exception by defendant, July 6, 1914;
- (24) Judgment for plaintiff for \$7,038.00, July 6, 1914;
- (25) Petition for writ of error and supersedeas, July 7, 1914;
- (26) Assignment of errors, July 7, 1914;
- (27) Citation, July 7, 1914;
- (28) Order of court allowing writ of error without filing of bond, July 7, 1914;
- (29) Motion for extension of time for signing and filing bill of exceptions, and filing transcript of record, July 7, 1914;

34 ALLAN H. RICHARDSON, ETC., VS. FAJARDO SUGAR CO.

64 (30) Order of court enlarging time for filing bill of exceptions and transcript, July 7, 1914;
(Signed) WOLCOTT H. PITKIN, JR.,
Attorney General of Porto Rico,
Attorney for Defendant and Plaintiff in Error.

Copy of above entitled praecipe received this 20th day of Oct., 1914.

(Signed) LOUIS BANIGAN,
Attorneys for Plaintiff and Defendant in Error.

65 In the District Court of the United States for Porto Rico.

Filed October 21, 1914.

Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.
ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled action, and their respective attorneys, that the transcript of record for the purposes of appeal, shall contain those proceedings, orders and papers ordered by the defendant and plaintiff in error in his praecipe for the transcript of record, filed with the Clerk of the above entitled court on October 21, 1914.

(Signed) WOLCOTT H. PITKIN, JR.,
Attorney General of Porto Rico,
Attorney for the Defendant and Plaintiff in Error.

(Signed) LOUIS BANIGAN,
Attorney for the Plaintiff and Defendant in Error.

66 In the District Court of the United States for Porto Rico.

(Filed October 20th, 1914.)

Law. No. 818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.
ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Stipulation.

It is hereby stipulated and agreed by and between the parties to the above entitled cause, and their respective attorneys, that it is the intention of both parties that the Supreme Court of the United

States assume appellate jurisdiction of the case, and the plaintiff hereby waives all objections and exceptions to procedure in taking the case to the Supreme Court of the United States from the District Court of the United States for Porto Rico.

(Signed) LOUIS BANIGAN,

Attorney for the Plaintiff.

(Signed) WOLCOTT H. PITKIN, JR.,

Attorney General of Porto Rico,

Attorney for the Defendant.

San Juan, Porto Rico, Oct. 20, 1914.

67 In the District Court of the United States for Porto Rico.

Filed October 26, 1914.

Law. No. 818.

FAJARDO SUGAR COMPANY, a Corporation, Plaintiff,
vs.

ALLAN H. RICHARDSON, Treasurer of Porto Rico, Defendant.

Bill of Exceptions.

Be it remembered, that in the above entitled case, on May 29, 1912, before his honor, Judge Paul Charlton, Judge of the above entitled court, and at a term of said court, both parties appearing duly represented by their respective counsel, the defendant made a motion to dismiss the complaint for want of jurisdiction of the court, which motion was in words as follows:

"Comes now Allan H. Richardson, the Treasurer of Porto Rico, by Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, his attorney, and moves to dismiss the complaint in the above entitled action, on the ground that this Honorable Court has no jurisdiction of the subject matter of the said suit, and that, upon the pleadings filed therein and upon the law, the defect in the jurisdiction of the said court is manifest."

That on August 6, 1912, His Honor, Judge Paul Charlton, Judge of the above entitled court denied defendant's motion to dismiss the above entitled case for lack of jurisdiction, to which ruling of the court the defendant then and there duly excepted.

That on April 10, 1913, at a term of the above entitled court, both parties appeared duly represented by their respective counsel,
68 before His Honor, Judge Peter J. Hamilton, Judge of said court, and the defendant moved to dismiss the complaint for want of jurisdiction, as follows:

"Now comes Allan H. Richardson, Treasurer of Porto Rico, the above named defendant, by Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, his attorney, and respectfully moves to dismiss the complaint in the above entitled action, upon the ground and for the reason that this Honorable Court has no jurisdiction of the subject matter of the said action, for the following reasons:

1. The complaint, amended complaint, and supplemental complaint, filed herein, although alleging a cause of action against this defendant, the Treasurer of Porto Rico as aforesaid, as an individual, in reality and in contemplation of law allege and set forth a cause of action against The People of Porto Rico.

2. That The People of Porto Rico are and constitute a sovereign body politic, and cannot be sued in this Honorable Court without its consent.

3. No consent has been given by the People of Porto Rico to be sued in this Honorable Court in respect to the alleged cause of action set forth in the said complaint, amended complaint and supplemental complaint filed herein."

That on June 26, 1913, the above entitled court made an order denying defendant's motion to dismiss for want of jurisdiction, to which order of the court defendant then and there duly excepted, and the court rendered an opinion which more fully appears in the transcript of record.

That on July 6, 1914, the above entitled case was called for trial before His Honor, Judge Peter J. Hamilton, Judge of the above entitled court, at a term of the said court held in the city of San

Juan. The plaintiff appeared by his attorney, Louis Banigan, and the defendant by its attorney, W. H. Pitkin, Jr., and the defendant filed a motion objecting to further proceedings, and praying for a dismissal of the cause on the ground of lack of jurisdiction, as follows:

"The above entitled case having been called for trial, comes now the defendant, Allan H. Richardson, as Treasurer of Porto Rico, by his attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, and objects to further proceedings in the case on the ground that the court has no jurisdiction over the defendant; and moves the court that the above entitled cause be dismissed for want of jurisdiction over the defendant, in that the suit though in form against the Treasurer of Porto Rico is in reality against The People of Porto Rico; The People of Porto Rico is not subject to suit without its consent, and consent has not been given to suit in this case."

That this motion was denied by the court, to which action the defendant then and there duly took exception; whereupon the parties filed the following stipulation of facts:

"It is hereby stipulated and agreed by and between the parties to the above entitled case, and their respective attorneys, that for the purposes of this suit the facts are as follows: Provided, that this stipulation shall not operate as a waiver of exceptions heretofore taken by either party:

The Fajardo Sugar Company is a corporation organized under the laws of the State of New York. In nineteen hundred and five it was duly registered in the office of the Secretary of Porto Rico and authorized to do business in Porto Rico. Since that time it has been engaged in Porto Rico in the business of growing and 70 grinding sugar cane, in all the branches of that business, in the business of holding, purchasing, acquiring, selling, assigning, transferring, and otherwise disposing of, personal property,

including the shares of capital stock, bonds and securities generally of other corporations, with the power to exercise all the rights and privileges of ownership thereof. It has acquired and at all times mentioned in this suit owned and operated a large modern vacuum mill for the manufacture of sugar from sugar cane at the city of Fajardo in Porto Rico. Its business of manufacturing sugar is conducted in the said city of Fajardo in the Island of Porto Rico, and its product—manufactured crude sugar—is shipped to American ports consigned to the said corporation, and is sold, through its officers and agents in the city of New York, to its various customers. Outside of the Island of Porto Rico the said corporation, except for office furniture, office supplies, and material and supplies purchased for its business in Porto Rico, possesses no real property nor tangible personal property. The said corporation purchases, through its officers and agents in the city of New York, all its machinery, building materials, coal and supplies, which are consigned to the said corporation in Porto Rico for use in Porto Rico. All money borrowed in its said business is borrowed, through its officers and agents, in the city of New York. All vessels engaged for the transportation of its products or supplies are chartered, through its officers and agents, in the city of New York. All meetings of the Board of Directors are held in the said city of New York, and the entire policy and management of the corporation, except for the local management of the said mill by the corporation through the resident

director, Mr. Jorge Bird Arias, is conducted in New York.

71 The company owns and operates no other sugar mill except the sugar mill in Fajardo in the Island of Porto Rico, nor does it conduct any manufacturing business except as hereinbefore stated.

The sugar cane used by the Fajardo Sugar Company at its mill is grown in a large district in the Northeastern part of the Island of Porto Rico, extending approximately from the town — Mamekes to the town of Naguabo. At the time when the said corporation was organized there was no line of railroad furnishing railroad facilities in the said district, nor did there exist in that district the transportation facilities necessary to transport from day to day from the cane fields to a modern sugar mill of the said type the amount of sugar cane requisite for its operation. Shortly after the organization of the Fajardo Sugar Company some of the officers thereof, organized, under the laws of the State of Connecticut, in order to provide suitable and adequate transportation facilities for the district and mill above referred to, the Fajardo Development Company, with authority, among other things, to operate a line or lines of railroad for transportation of passengers and freight. Of a total authorized capital stock of a par value of nine hundred thousand dollars (\$900,000.00), five hundred eighty-seven thousand five hundred dollars (\$587,500.00) in par value has been issued, and of the said issued stock, five hundred eighty-six thousand five hundred dollars (\$586,500.00) in par value was acquired as issued by the Fajardo Sugar Company. The Fajardo Development Company in the year 1905 was registered in the office of the Secretary of Porto Rico as a foreign corporation and took out the proper license from the Treas-

urer of Porto Rico to conduct its business within the Island of Porto Rico. Thereafter the Fajardo Development Company constructed and acquired, and at all times mentioned herein and in the complaint and answer filed in this suit owned and operated under the laws of Porto Rico a line of railroad extending from the town of Mameyes through the city of Fajardo to the city of Naguabo in Porto Rico and serving the cane district above referred to. The said line of railroad principally serves the said Fajardo Sugar Company for the transportation of its raw material and its product within the Island of Porto Rico, subject to the same rates and tariffs and rules and regulations as apply to the general public, and also serves the public generally in that part of the Island of Porto Rico as a common carrier of freight and passengers. The Fajardo Development Company has paid unconditionally all the taxes assessed to it in favor of The People of Porto Rico for the fiscal year 1911-12.

In pursuance of the authority contained in the articles of incorporation of the Fajardo Sugar Company, the said company purchased, out of its capital, and now and at all times mentioned herein and in the complaint and answer filed in this action, holds five thousand eight hundred sixty-five (5865) shares of stock of the par value of five hundred eighty-six thousand five hundred dollars (\$586,500.00) of the said Fajardo Development Company.

The certificates representing the said 5865 shares of the capital stock of the Fajardo Development Company are now, and have been at all times mentioned in the pleadings, held by the Fajardo Sugar Company in the city of New York.

The taxes upon the Fajardo Sugar Company for the fiscal year 1911-12 were assessed by the Treasurer of Por'o Rico under and by virtue of Section 320 of the Political Code of Porto Rico of 1902, relating to taxes on foreign corporations. One item in the assessment was for five hundred eighty-six thousand five hundred dollars 73 (\$586,500.00) with respect to the stock of the Fajardo Development Company held by the Fajardo Sugar Company as above stated.

From that part of the assessment for taxes relating to the five hundred eighty-six thousand five hundred dollars shares of stock of the Fajardo Development Company owned by the Fajardo Sugar Company appealed to the Permanent Board of Equalization and Review, on the ground that the said shares of stock had their situs beyond the jurisdiction of Porto Rico and were therefore not subject to taxation under the laws of Porto Rico. The said Board, after due hearing, at which the attorney for the Fajardo Sugar Company was present, made *inter alia* the following finding, as appears from the minutes of the said Board:

(1) That the amount in question is capital actually invested in Porto Rico and is employed by the Faiardo Sugar Company in the transaction of its business in the Island.

* * * * *

In view of the foregoing facts the Board sustains the action of the assessor in assessing the Fajardo Sugar Company for the five hun-

dred eighty-six thousand five hundred dollars (\$586,500.00) invested in shares of the Fajardo Development Company and it is so ordered.'

The Treasurer of Porto Rico duly levied upon the said assessment the sum of seven thousand thirty-eight dollars (\$7,038.00) as taxes for the fiscal year 1911-12. This tax has been paid in full, under due protest, as provided by law and this action was instituted within thirty days after the payment of said tax, pursuant to Act No. 35, approved March, 1911, providing for the payment of taxes under protest, establishing procedure for the recovery thereof, and for other purposes, Laws of Porto Rico, 1911, page 124."

74 Whereupon the defendant moved for judgment in his favor, as follows:

"Comes now the defendant in the above entitled cause, Allan H. Richardson, as Treasurer of Porto Rico, by his attorney, Wolcott H. Pitkin, Jr., Attorney General of Porto Rico, at the close of the proceedings on the trial of the said cause, and moves the court for judgment in his favor and against the plaintiff for costs."

The court denied said motion, to which ruling of the court in denying the motion of the defendant, the defendant duly excepted.

And thereupon the plaintiff moved for a judgment in its favor for the sum of \$7,038.00, without interest or costs, and defendant renewed his motion to dismiss the cause for want of jurisdiction, the defect in jurisdiction being manifest upon the pleadings in said cause; whereupon the court, having duly considered the matter, denied the motion of the defendant to dismiss for want of jurisdiction, to which action of the court the defendant duly excepted, and the court thereupon rendered judgment for the plaintiff in the sum of \$7,038.00 without interest or costs.

These were all the proceedings in the above entitled cause, not fully appearing in the record thereof. The defendant prays that this his bill of exceptions be allowed and signed by the court and that the same be made a part of the record in this cause; which is done accordingly this 26th day of October, 1914.

(Signed) PETER J. HAMILTON,
*Judge of the District Court of the United States
for the District of Porto Rico.*

Above Bill of Exceptions approved and consented to this 24th day of October, 1914.

(Signed) LOUIS BANIGAN,
Attorney for Plaintiff and Defendant in Error.

75 In the District Court of the United States for Porto Rico.

818. Law.

FAJARDO SUGAR COMPANY
vs.
THE TREASURER OF PORTO RICO.

Journal Entry, October 26, 1914.

Comes the People of Porto Rico and presents to the Court its Bill of Exceptions herein, which said Bill is settled, approved and signed by the Court.

76 In the District Court of the United States for Porto Rico.

Filed October 26, 1914.

Law. No. 818.

FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
vs.
ALLAN H. RICHARDSON, Treasurer of Porto Rico.

Additional Praeclipe for Transcript of Record.

To the Clerk of the above-entitled court:

You are hereby directed to prepare a duly authenticated transcript of the record, minute proceedings, orders and papers in the above entitled cause, in addition to those ordered by the praecipe filed October 21, 1914, as follows:

- (32) Copy of Praeclipe for Record, filed October 21, 1914;
- (33) Stipulation as to praecipe of record, filed October 21, 1914;
- (34) Stipulation as to proceeding on appeal, filed October 20, 1914;
- (35) Bill of Exceptions, filed October 26, 1914;
- (36) Order of court approving Bill of Exceptions, October 26, 1914;
- (37) Copy of this additional praecipe for transcript of record.

(Signed) WOLCOTT H. PITKIN, JR.,
Attorney General of Porto Rico,
Attorney for Defendant and Plaintiff in Error.

Copy of above entitled additional praecipe for transcript of record, received this 26th day of October, 1914, and consent to the incorporation of the above matters in the transcript of record is hereby given.

(Signed) LOUIS BANIGAN,
Attorney for the Plaintiff, Defendant in Error.

77 In the District Court of the United States for Porto Rico

#818. Law.

FAJARDO SUGAR COMPANY
vs.
THE TREASURER OF PORTO RICO.

Certificate.

I, Antonio Aguayo, Clerk of the District Court of the United States for Porto Rico, do hereby certify that the foregoing typewritten pages numbered 1 to 76 inclusive, to be a true and correct copy of certain proceedings in the above entitled cause, as called for by the praecipes filed by the counsel for the appellant, copies of said praecipes are hereto attached.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 27th day of October, A. D. 1914.

[Seal United States District Court for the District of Porto Rico.]

ANTONIO AGUAYO,
Clerk U. S. District Court for P. R.

78 UNITED STATES OF AMERICA, ss:

The President of the United States to the Honorable the Judge of the District Court of the United States for the District of Porto Rico, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court of the United States for Porto Rico, before you, between the Fajardo Sugar Company, a corporation, plaintiff, and Allan H. Richardson, as Treasurer of Porto Rico, defendant, a manifest error hath happened, to the great damage of the said defendant as by the complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the

United States, the Seventh day of July, in the year of our Lord one thousand nine hundred and fourteen.

[Seal United States District Court for the District of Porto Rico.]

ANTONIO AGUAYO,
*Clerk of the District Court of the
 United States for Porto Rico.*

Allowed by:

P. J. HAMILTON,
*Judge of the District Court of the
 United States for Porto Rico.*

79 In the District Court of the United States for Porto Rico.

Law. #818.

THE FAJARDO SUGAR COMPANY (a Corporation), Plaintiff,
 v.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico, Defendant.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Fajardo Sugar Company, a Corporation, and to Louis Banigan, its Attorney of Record.
 Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States at Washington within sixty days from the date hereof pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Porto Rico, from a final judgment filed and entered on the 6th day of June, 1914, in that certain suit at law, No. 818, wherein Allan H. Richardson, as Treasurer of Porto Rico, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Peter J. Hamilton, Judge of the
 80 District Court of the United States for the District of Porto Rico, this seventh day of July, in the year of our Lord, nineteen hundred and fourteen.

[Seal United States District Court for the District of Porto Rico.]

PETER J. HAMILTON,
*Judge of the District Court of the United
 States for the District of Porto Rico.*

Service of the above citation acknowledged this 7th day of July, 1914.

THE FAJARDO SUGAR COMPANY,
LOUIS BANIGAN, *Attorney for Plaintiff,*
By LOUIS BANIGAN,
Attorney for the Fajardo Sugar Company, Plaintiff.

Endorsed on cover: File No. 24,434. Porto Rico D. C. U. S. Term No. 690. Allan H. Richardson, as treasurer of Porto Rico, plaintiff in error, vs. The Fajardo Sugar Company. Filed November 10th, 1914. File No. 24,434.



U.S. Supreme Court, N.Y.

FILED

FEB 4 1916

JAMES D. MAHER

CLERK

No. 280

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

ALLAN H. RICHARDSON, as Treasurer of Porto Rico,
Plaintiff in Error,

v.

THE FAJARDO SUGAR COMPANY.

In Error to the District Court of the United States for
Porto Rico.

BRIEF FOR PLAINTIFF IN ERROR.



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In the Supreme Court of the United States.

OCTOBER TERM, 1915.

ALLAN H. RICHARDSON, as Treasurer of
Porto Rico, *Plaintiff in Error*,
v. } No. 280.
THE FAJARDO SUGAR COMPANY.

*IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR PORTO RICO.*

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here on a writ of error to the United States District Court for the District of Porto Rico to review a judgment of that court rendered against Allan H. Richardson, as Treasurer of Porto Rico, for \$7,038, without interest or costs, in an action brought under an act of the local Legislature by the Fajardo Sugar Company, a New York corporation doing business in Porto Rico, against the Treasurer to recover that amount representing taxes which had been assessed upon certain personal property of the Company for the fiscal year 1911-1912 and paid in

full under protest. The ground of protest, and of this action, was that the assessment in question was illegally levied upon certain shares of stock of another corporation which were owned and held by the plaintiff company and claimed by it to be not employed in the transaction of business in Porto Rico, and without the taxing jurisdiction of the Government of Porto Rico—that is to say, stock of a Connecticut corporation also doing business in Porto Rico the certificates of which were held by the objecting company at its office in New York.

The defendant Treasurer, represented by the Attorney General of Porto Rico, first answered upon the merits but thereafter questioned with persistence the jurisdiction of the court to entertain the suit upon the ground that it was a suit in effect against the Government of Porto Rico, maintainable only in violation of its right to immunity; and, in a word, it is the especial object of this writ, questioning at the same time the judgment of the court below upon the merits, to seek here a reversal of the lower court's denial of that contention.

The facts of the case and the history of the litigation (Pleadings, R. 1-22; Stipulated Facts, R. 36-39) are as follows:

The Fajardo Sugar Company, plaintiff below and defendant in error here, hereinafter referred to as the Sugar Company, is a corporation organized under the laws of the State of New York, and in

1905 was duly registered and authorized to do business in Porto Rico. Since that time it has been engaged in Porto Rico in all the branches of the business of growing and grinding sugar cane, and in the business of acquiring and exercising all the rights and privileges of ownership in personal property, including the shares of capital stock, bonds, and securities generally, of other corporations. While the Sugar Company maintains an office in the City of New York, through which it conducts its general fiscal affairs, purchases its supplies, charters the necessary transportation for conveying its supplies to and manufactured products from Porto Rico, and in which the directors meet and determine upon the general management and policy of the corporation, still the sole manufacturing business in which the Sugar Company is engaged, and to which the activities just mentioned are but minor incidents, is carried on in Porto Rico. There, in the City of Fajardo, the Sugar Company maintains a great manufacturing plant, consisting of a gigantic modern vacuum mill with its numerous accessories, for the manufacture of sugar from sugar cane, of a capacity which consumes all the cane grown in the northeastern section of the island. The actual local management of this immense plant is in a resident director of the corporation. The manufactured crude sugar is shipped to American ports consigned to the company and is sold at its New York office to its various cus-

tomers. Except for office furniture and office supplies, materials, and supplies purchased in the United States and thereupon consigned to the corporation in Porto Rico for use in Porto Rico, the Sugar Company possesses no real property and no tangible personal property whatever outside of the Island of Porto Rico.

At the time when the Sugar Company was organized to engage in sugar manufacturing, there was no line of railroad or other transportation facilities in this district available to transport daily from the cane-fields to a modern sugar mill of such capacity the quantity of cane required for its operation. For the purpose of supplying this transportation deficiency, shortly after the organization of the Sugar Company some of its officers organized, under the laws of the State of Connecticut, another company, known as the Fajardo Development Company, hereinafter referred to as the Development Company, with the authority, among other things, to operate a line or lines of railroad for the transportation of freight and passengers. Of a total authorized capital stock of \$900,000, par values, \$587,500 was issued, and of this stock and as it was issued, \$586,500, representing 5,865 shares, was acquired by the Sugar Company. The Sugar Company, pursuant to the authority contained in the articles of incorporation, purchased this stock out of its capital, and during the fiscal year in question owned and held

said stock, but the certificates representing the shares were held by it at its office in New York City. In the same year (1905), the Development Company was also licensed to conduct its business in Porto Rico, and it thereupon constructed and acquired, and has ever since owned and operated, under the laws of Porto Rico, a line of railroad extending throughout the extensive cane district above mentioned, and serving principally the Sugar Company for the transportation of its raw materials and its manufactured products, and also the general public as a common carrier of general freight and passengers.

The assessment of the property of the Sugar Company was made under Section 320 of the Political Code of Porto Rico (1902), relating to taxes on foreign corporations, which, so far as pertinent here, provides as follows:

SECTION 320. The assessment of every corporation, joint-stock, and limited-liability company not incorporated in Porto Rico, but engaged in the transaction of business therein, other than banks, banking institutions having a share capital, shall be made in the manner provided by this title for the assessment of the property of institutions, corporations, and companies incorporated under the laws of Porto Rico: *Provided, however,* that in the determination of the actual present value of the capital of such corporations *only such part of the capital of such corporations shall be considered and assessed as is*

*employed in the transaction of business in Porto Rico, but the amount of such capital shall in no case be less than the value of the real and personal property of such corporation or company situated in Porto Rico, including in such personal property all franchises or concessions granted said corporation or company under the laws of Porto Rico * * *.*

And the Treasurer, assessing the property of the Sugar Company for the said fiscal year, pursuant to said section, included within, and as one item of the assessable property of said Sugar Company—that is to say, as a part of the capital of the Sugar Company employed in the transaction of business in Porto Rico—the stock of the Development Company purchased and held as aforesaid. From that part of the assessment the Sugar Company appealed to the Permanent Board of Equalization and Review, claiming that such assessment was illegal “upon the ground that the said shares of stock had their situs beyond the jurisdiction of Porto Rico”; but the Board found “that the amount in question is capital actually invested in Porto Rico, and is employed by the Fajardo Sugar Company in the prosecution of its business in the Island,” and sustained the action of the assessor. The Treasurer thereupon duly levied upon the assessment the sum of \$7,038 for the said fiscal year, payable in two equal semi-annual installments. The Sugar Company thereupon paid the tax under protest, and, assuming to avail itself

of the remedy provided by the Legislature of Porto Rico for the recovery of taxes illegally levied and paid under protest, brought its action therefor not in the local courts of the sovereign but in the United States court for that District.

The act under which this suit was brought and upon the construction of which must depend, it is believed, the solution of the jurisdictional question here raised—that is to say, whether the United States court is, in the language of the act, “the court having competent jurisdiction thereto”—is Act No. 35, Laws of Porto Rico, 1911, providing for the payment of taxes under protest, and establishing a procedure for the recovery thereof, which, in pertinent portions, is as follows:

SECTION 1. That in all cases in which an officer charged by law with the collection of revenue due the Government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

SEC. 2. Be it further enacted, that upon his making such payment, the officer or collector shall pay such revenue into the treasury of Porto Rico, giving notice at the time of the payment to the Treasurer that the same is paid under protest.

SEC. 3. Be it further enacted, that the party paying said revenue under protest may, at any time within thirty days after making said payment, and no longer thereafter, sue the said Treasurer for said sum, for the recovery thereof, *in the court having competent jurisdiction thereto*; and if it be determined that the same was wrongfully collected, as not being due from said party to the Government for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded. Thereupon the Treasurer shall repay the sum, which payment shall be made in preference to other claims on the Treasurer. *Either party to said suit shall have the right of appeal to the Supreme Court.*

SEC. 4. Be it further enacted that there shall be no other remedy in any case of the collection of revenue or attempt to collect revenue illegally.

SEC. 5. Be it further enacted that no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue; either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

The Attorney General of Porto Rico appeared and defended the suit. He first filed an answer. After-

wards the question of jurisdiction was raised and urged insistently. On June 10, 1912, Attorney General Pitkin made a motion to dismiss (R. 19), on the ground that the court was without jurisdiction of the defendant and of the action, which, on August 6, 1912, was denied. On April 10, 1913, the Attorney General again moved for a dismissal of the action, specially setting out therein that the suit was one in reality against The People of Porto Rico, that The People of Porto Rico are a Sovereign immune from suit without its consent, and that consent had not been given to said suit in said court, and after briefs and arguments, Judge Hamilton, on June 26, 1913, denied the motion, and filed an extensive opinion giving his reasons therefor (R. 21-26, reported in 6 P. R. F. R. 224). Accordingly, on July 6, 1914, the case came on for trial and again the Attorney General filed a motion objecting to further proceedings and praying for a dismissal, reiterating the former grounds therefor, which motion was again denied. Thereupon the parties waived a jury and stipulated the facts for the purpose of the suit substantially as herein set out (R. 36-39). At the close of the trial, after motions for judgment by both sides, the Treasurer renewed his motion to dismiss for want of jurisdiction, which was again and finally denied, and the court thereupon rendered judgment for the Sugar Company.

The Record (page 30) presents, in effect, the following:

Assignment of Errors.

1. The court erred in entertaining jurisdiction of this suit; and
2. The court erred in rendering judgment for the Sugar Company.

ARGUMENT.

Our argument, in outline, is as follows:

A. Preliminarily—

- I. This Court has jurisdiction of this writ of error.
 1. The required jurisdictional amount is here in dispute and constitutes the ground of review.
 2. No certificate is required as to the question of jurisdiction of the court below.
 3. Writ of error and not appeal is the proper procedure for review.
- II. The opinion below does not stand analysis.
 1. It seems lacking in consistency and guiding principles.
 - (a) Upon the question of Porto Rico's immunity from suit.
 - (b) Upon the question whether the suit was one against Porto Rico.
 - (c) Upon the question of consent, or waiver, in this instance.
 2. It seems to have been guided by inadmissible conceptions of justice, public policy, and convenience.

- B. The Court below had no jurisdiction of the defendant or of the action.
 - I. Porto Rico's immunity from suit is the immunity of a Sovereign, and is of the same protective quality as the immunity of the United States and of the several States and Territories.
 - II. This suit, though in form against the Treasurer, is in reality against The People of Porto Rico.
 - III. The sovereign may limit its consent to be sued to its own courts.
 - IV. The statute in question does not grant the consent of The People of Porto Rico to be sued in the Federal Court for Porto Rico.
 - 1. The nature and incidents of the remedy created show conclusively an intention on the part of the legislature to commit the matter solely to the Insular courts.
 - 2. The judicial power conferred upon the Federal Court for Porto Rico does not authorize it to exercise the power of certification conferred by the act in question.
 - 3. Consent of the Sovereign to be sued, being in derogation of sovereignty, must be established in clear and unmistakable terms, and cannot be established or enlarged by construction.

V. Jurisdiction of this suit and of the defendant was not conferred by the appearance and answer of the Attorney General and the Treasurer of Porto Rico, for consent of the Sovereign to suit can be granted, and exemption from suit waived, only by Act of the Legislature.

C. The judgment is wrong on the merits.

I. The shares of stock in question were a part of the capital of the company "employed in the transaction of business in Porto Rico," and the assessment of the same as such was in all respects lawful.

- (a) Jurisdiction of Porto Rico to impose the tax.
- (b) Construction of Section 320, of the Political Code.

A.

PRELIMINARILY.

I.

This Court Has Jurisdiction of This Writ of Error.

This writ of error was sued out under Section 244, Judicial Code (Act of March 3, 1911, 36 Stat. 1087, 1157, Chap. 231), which superseded the practice established by Section 35 of the Foraker Act (of April 12, 1900, Chap. 191, 31 Stat. 77, 85), and which itself was repealed by the Act of January 28, 1915 (38 Stat. 804, Chap. 22), but with the reservation of

cases then pending in this Court, as was the present case.

The practice, therefore, governing the review of this case is that prescribed in said Section 244, Judicial Code, which is as follows:

SEC. 244. Writs of error and appeals from the final judgments and decrees of the supreme court of, and the United States district court for, Porto Rico, may be taken and prosecuted to the Supreme Court of the United States, in any case wherein is involved the validity of any copyright, or in which is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, or wherein the Constitution of the United States, or a treaty thereof, or an Act of Congress is brought in question and the right claimed thereunder is denied, without regard to the sum or value of the matter in dispute; and in all other cases in which the sum or value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party or of other competent witnesses, exceeds the sum or value of five thousand dollars. Such writs of error and appeals shall be taken within the same time, in the same manner, and under the same regulations as writs of error and appeals are taken to the Supreme Court of the United States from the district courts.

1. The Required Jurisdictional Amount is Here In Dispute and Constitutes the Ground of Review.

Seven thousand and thirty-eight dollars is the matter here in dispute; that is the amount demanded in the supplemental complaint sworn to by Jorge Bird Arias, General Manager of the Sugar Company, in verification of said complaint (R. 12); that is the amount of the judgment now sought to be reviewed (R. 27); that that is the amount in dispute is shown by the oath of the said Arias, and by the oath of the Clerk of the Court below stating that the transcript of the record containing the judgment for \$7,038 is correct.

The fact that the demand for the full amount of the equal semi-annual payments was carried by a supplemental complaint, matters not upon principle or the authorities. The case proceeded upon the petition as amended or supplemented. *Washer v. Bullitt County*, 110 U. S. 558; *The Alaska*, 130 U. S. 201. The requirement as to jurisdictional amount is met even where suits are consolidated and the judgment in the consolidated case reaches the jurisdictional amount. *Hawley v. Fairbanks*, 108 U. S. 543; *B. & O. R. R. Co. v. United States*, 220 U. S. 94.

2. No Certificate is Required as to the Question of Jurisdiction of the Court Below.

Section 244, Judicial Code, under which this writ of error was sued out, requires that this writ of error should be taken in the same manner and under the

same regulations as writs of error to this Court from the District Courts, and Section 238, Judicial Code, regulating writs of error from the District Courts, provides that:

Appeals and writs of error may be taken from the district courts, including the United States district court for Hawaii, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue, in which case the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision; * * *.

If a first reading of these two sections should give the impression that the manner of raising the jurisdictional question in this case should be by certificate, that impression, upon a moment's reflection, will be seen to be erroneous.

In the first place, Section 238 deals with the grounds for review, one of which is the question of jurisdiction of the district court. The regulation as to a certificate applies only when the question of jurisdiction is the ground of review. In this case, however, the jurisdictional amount constitutes the ground of review, and the regulation as to the certificate has no application.

In the second place, the question of jurisdiction there referred to must be a question of jurisdiction of the court *as a Federal Court*; whereas, in this case, as will more fully appear further on, the question

of the jurisdiction of the lower court as a Federal Court is not in issue at all. The want of jurisdiction is based on the proposition that the real defendant had not consented to suit, a question which does not involve the Federal character of the court as such.

3. Writ of Error and Not Appeal is the Proper Procedure for Review.

The Judicial Code lays down no distinguishing rule in this regard; but upon principle, and upon the decisions and statutory provisions regulating appeals and writs of error from district and circuit courts prior to the new Judicial Code, it is clear that writ of error is the proper method of review in this case.

The general rule is that writ of error is the proper proceeding for the review of the judgment of the court of law. See *Carino v. Insular Government*, 212 U. S. 449, where this Court, applying the general principle, held that writ of error was the proper method to bring up from the Philippine Supreme Court a registration proceeding.

Clearly this suit for the recovery of taxes is a suit at law. *Chase v. United States*, 155 U. S. 489.

Owing to the similarity of the statute which regulated appellate procedure from the territorial supreme court of Oklahoma to the section of the Judicial Code governing this writ of error, certain cases decisive of the procedure under that statute are in

point here. That Act (of May 2, 1890, 26 Stat. 81, Chap. 182) provided that:

Writs of error and appeals from the final decisions of the said supreme court shall be allowed, and may be taken to the Supreme Court of the United States in the same manner and under the same regulations as from the circuit courts of the United States.

In *Comstock v. Eagleton*, 196 U. S. 99, it was held that under this statute writ of error should be used and not appeal in all law cases, even though the trial was had without a jury. That case was an action for false imprisonment, tried without a jury, and came to this Court on appeal, which the Court dismissed, saying (page 100):

Final judgments of the circuit courts of the United States in actions at law can only be revised on writs of error.

To the same effect is *Oklahoma City v. McMaster*, 196 U. S. 529, and see also *Guss v. Nelson*, 200 U. S. 298, where those two cases were reviewed, approved and followed.

It is established, then, that a suit at law, tried by the circuit court without a jury, prior to the new Judicial Code, was brought to this Court for review not by appeal, but by writ of error. Since the procedure in this case, under Section 244 of the new Judicial Code, must be the same as that in the Dis-

triet Court, and procedure in the District Court is the same as that in the old circuit court (Section 291 of the Judicial Code), it is clear that writ of error is the proper procedure here.

Of course, those suits at law tried without a jury and arising in Porto Rico prior to the enactment of the new Judicial Code and coming to this Court on appeal as the proper procedure, are to be distinguished. They were governed by Section 35 of the Foraker Act, which adopted for cases coming up from Porto Rico the method of review governing cases coming up from the territories (Act of April 7, 1874, 18 Stat. 27, Chap. 80) where whether or not a trial by jury was had, was the sole test of the method of review.

II.

The Opinion Below Does Not Stand Analysis.

The extended opinion filed by the district judge in support of his denial of the motion to dismiss proceeds upon such an obscure perception of principles and such confused reasoning that the conclusion could not well be other than erroneous.

I. It Seems Lacking in Consistency and Guiding Principles.

If the conclusion of the court below is right—that is, if it had jurisdiction of the suit—the distinct reasons assigned therefor cannot be found in the opinion. It cannot be said upon what the conclusion rests—whether upon the theory that Porto

Rico's immunity from suit was of a qualified kind, or that the suit was not one against Porto Rico, or that immunity was waived in this instance by the appearance and answer of the Treasurer and Attorney General, or that the Legislature itself had consented to the suit.

(a) *Upon the question of Porto Rico's immunity from suit.*

Notwithstanding the motion to dismiss was based upon the *Rosaly case* (227 U. S. 270), wherein this Court decided unequivocally that the Government of Porto Rico has the sovereign attribute of immunity from suit without its consent, the court nevertheless treated the question as *res integra*, saying:

The point of jurisdiction sought to be raised by the motion to dismiss is that under the case of the People of Porto Rico *v. Rosaly* (227 U. S. 270), the People of Porto Rico are a sovereign and cannot be sued. *This is an important question and should receive consideration.*

The opinion then (R. 23) enters upon certain distinctions to the effect that Porto Rico is not a State in any sense of the word, but that in the case just mentioned this court held that The People of Porto Rico "constitute *pro tanto* a Territory, and that they occupy a position gradually evolved by a series of decisions of this Court; that Porto Rico is to be distinguished from Hawaii in that Congress has sent

the Constitution along with the flag to the latter but not to the former, and the organic act for the Government of Porto Rico, passed but a few days before that of Hawaii, did not, as it did in the case of Hawaii, use the term 'territory' in defining the status of Porto Rico;" that Porto Rico is a territory only for certain limited purposes, and is, in some respects, more like a State than a Territory, but "upon the whole, Porto Rico is much more in the nature of a dependent state external to the United States and corresponding to what are called possessions of the British Crown, more than to a technical territory of the United States." After thus distinguishing Porto Rico from a State, and from one of the old incorporated Territories and then from Hawaii, and likening it to a "possession of the British Crown," and after suggesting the possibility that all this makes no material difference, the court concludes that "Porto Rico as a government is exempt from suit *in its own name.*"

The thought back of the discussion upon this point seems to conceive of the immunity of a State or Territory not as a necessary incident of sovereignty but as an empirical quality assigned to these organisms of government by the constitution, and, in contradistinction, assumes that such immunity as Porto Rico may have, had its origin in nothing ulterior to certain decisions of this Court which are themselves regarded as determinants of public policy.

rather than expositions of organic law. In the face of these decisions, and concerning their effect, the District Court said that "they must be taken not as establishing any particular rule, but as limited to the facts of the particular case." The conception as to such origin is as wrong in the one instance as in the other. Even if it were right, discriminations between sovereignties in respect to this quality of immunity is futile. If sovereign immunity from suit exists at all, how can it be qualified by reason of its origin or be affected by the ~~mag~~ title of the Sovereign? And if such qualification was not in the mind of the court and swaying it, what then was the object of the discussion indulged in by the court in the very face of the *Rosaly case*? There was a failure, to which this discussion must have contributed, to accord to Porto Rico the extent and quality of sovereignty which this court clearly said Congress had conferred upon her.

(b) *Upon the question whether the suit was one against Porto Rico.*

In paragraph 2 the opinion proceeds upon the proposition that the suit was one against Porto Rico but that the right of immunity had been waived by the appearance and answer of the Treasurer of Porto Rico represented by the Attorney General; and in paragraph 6, it proceeds upon the same proposition, but holds that by the statute here in question the Legislature of Porto Rico had waived the immunity.

Paragraph 5 of the opinion, however, is to the effect that the suit was not a suit against The People of Porto Rico but was against the Treasurer in a capacity which did not involve the Government of Porto Rico at all. Admittedly, this last-mentioned view was based, in part at least, upon the result of the discussion devoted to the discovery of a distinction between the quality of sovereignty possessed by Porto Rico and that which belongs to the several States, the former incorporated Territories, and even the Territory of Hawaii. The discovery resulting from that discussion was that Porto Rico is only "exempt from suit *in its own name.*" "The material question," the court said, "is to see how far this applies to the case at bar," and proceeding to reply, said—

The suit at bar is not one against Porto Rico by name. The question arises, does a suit against the Treasurer constitute a suit against Porto Rico?

and, then, after advertizing to the fact that an affirmative suit against appropriate officers is just as much a suit against the Sovereign as if the suit were against the Sovereign by name, and to the further fact that, the validity of the statute here being unquestioned, this was not a case where an officer was seeking refuge behind an invalid statute, answered the self-propounded questions, thus:

The suit is designed to *compel* the Treasurer of Porto Rico to carry out his duties under

what may be assumed to be a valid statute.
It is not evident in what respect this is a suit against The People of Porto Rico.

Aside from the inconsistencies here pointed out, it could hardly escape notice that the Court here changed the entire theory of the suit made by the pleadings. An action to compel a public official to perform a statutory duty under general principles of law or the local Code, has no analogy whatever to the action here.

(c) *Upon the question of consent or waiver.*

As just mentioned, the Court below at one point of the opinion based its jurisdiction upon the view that the Treasurer and the Attorney General by their mere appearance and answer, had waived the immunity of Porto Rico from suit, the court saying in this regard:

The question next arises whether the defendant has not submitted to the jurisdiction of the court by appearing and filing an answer. This would seem to be the law. A party cannot be permitted to blow hot and cold; to appear so far as it is advantageous to him and to withdraw his appearance when it ceases to be so. The appearance was by the Treasurer of Porto Rico in his own name and by the Attorney General of Porto Rico representing the defendant for all purposes. It would seem true also that if the defendant was ever in court, as cannot be disputed, he is now while

making his present motion. It is true there are cases holding that an official cannot waive the rights of a state by appearing in a suit, but this is not one of such cases. *Adams v. Bradley*, Fed. Cas., No. 48; *Case v. Terrell*, 11 Wall. 199, 202; *United States v. Lee*, 106 U. S. 196, 205. (Paragraph 2 of the opinion.)

Later on, however, the court expressed it as its view that such a waiver can be made only by the Legislature, and found the necessary waiver or consent in the statute in question, saying:

There is no question that a sovereignty, whatever may be its nature, can waive its non-liability to suit. This can be done only in pursuance to a law passed by the law-making body, and, in the case at bar, there has been a law passed on the subject. This is the Act of March 9, 1911, Laws of 1911, page 124. Sections 3, 4, and 5, are as follows: * * *

quoting the act upon which the suit was based.

2. It Seems to Have Been Guided by Inadmissible Conceptions of Justice, Public Policy, and Convenience.

On all principle, the ruling of the court below upon the jurisdictional question was wrong. The considerations which largely induced the error are believed to be revealed in the concluding paragraph of the opinion, which is as follows:

Upon the whole, therefore, it does not appear that the motion to dismiss for want of jurisdiction should prevail. Any other construction of the act than the one above

expressed would remove from American citizens the protection of Federal courts and leave them at the discretion of the Insular authorities. It is not to be presumed that the Insular authorities would do injustice, but it is also true that the object of a Federal court is to afford all constitutional protection to American citizens and to foreigners having financial interests in the locality in question, whether it be an organized State of the Union or an Insular possession, like Porto Rico. The conclusion arrived at, therefore, seems to be supported by sound public policy and also by the fact that if a suit was brought in the local courts under this act, which affected an American citizen or a foreigner, it could, on motion, be removed to the Federal court. Entertaining jurisdiction in the first instance merely prevents this circuity of action.

This reasoning is full of faults. The Insular authorities had to be trusted to give the right to a judicial remedy. They need not have given it; but they did give it, and whenever they so desire they can take it away. Why invoke the Federal safeguard of a right which exists only at local will? Immunity from suit is an established government prerogative which, whatever be the logic of its existence, is concededly sound as a practical and necessary precept of public policy. If Porto Rico has this immunity it is a shield against the suit of the American and foreigner as well as against the suit of the

citizen. It is a sovereign prerogative subject to no private demands. One's concept of justice is not to be impeached if it refuses to place claims against the Sovereign and claims against the individual on the same remedial plane; for, after all, it is only a matter of remedy, the only question being whether it shall be sought in a legislative rather than in a judicial forum. Of course, all that is said about the right of removal is begging the question, which is whether the consent is limited to suits in the local court.

B.

THE COURT BELOW HAD NO JURISDICTION OF THE DEFENDANT OR OF THE ACTION.

We shall show that this is so because the suit was in reality against the Government of Porto Rico which is Sovereign in its attributes and exempt from suit without its consent, and which had consented to suit in cases of this kind only when brought in its own courts.

I.

Porto Rico's Immunity from Suit is the Immunity of a Sovereign, and is of the same Protective Quality as the Immunity of the United States and of the several States and Territories. *Porto Rico v. Rosaly*, 227 U. S. 270.

The somewhat anomalous political relation of Porto Rico to the Union, which seems to have influenced the court below, is wholly immaterial.

The Organic Act of Porto Rico created a Sovereignty immune from suit, with a complete similarity in such respect to the several States and Territories. That proposition is no longer open to question. It was unequivocally settled by this Court in the *Rosaly* case.

II.

This Suit, though in Form Against the Treasurer of Porto Rico, is in Reality Against The People of Porto Rico.

The suit was not against The People of Porto Rico by name; for that reason the Court below seems to have been influenced by a doctrine which, though announced one time long ago by this Court (*Osborne v. Bank*, 9 Wheat. 738), hardly survived the announcement. The established general rule is, that whether the sovereign is the actual defendant is to be determined by the nature of the case and not by mere reference to the nominal parties of record. The suit here was brought under an act of Porto Rico making provision and a promise for the return to tax-payers of such amount as may be adjudged to have been taken from them under an illegal assessment, in the following language:

That, the party paying said revenue under protest may, at any time within thirty days after making said payment, and not longer thereafter, *sue the said Treasurer* for said sum, for the recovery thereof, *in the court having competent jurisdiction thereto*; and if it be determined that the same was wrongfully collected as not

being due from said party *to the Government*, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, which payment shall be made *in preference to other claims on the Treasury*. Either party to said suit shall have the right of appeal to the Supreme Court. (Section 3, Act of March 9, 1911.)

Thus it is seen that the suit authorized to be brought, and actually brought in this case, is against the Treasurer of Porto Rico as such; the relief sought is against that officer in his official capacity, and, if obtained, will compel the Treasurer to pay out of public funds in the Treasury of Porto Rico a certain sum of money. The suit is not to recover specific moneys in the hands of the Treasurer, for the money has been covered into the Treasury and the amount recovered is to be paid out of the Treasury like other claims but in preference to them. Nor is it a suit to compel the Treasurer to perform a plain ministerial duty; it is a suit on the merits brought against the Government, involving the treasury, and the decision of the court of first instance may be appealed to the Supreme Court. It is a suit to enforce the liability of the Government of Porto Rico to pay a certain sum of money on account of the payment of taxes into the Treasury alleged to have been wrongfully exacted by Porto Rico.

This case is on all-fours with *Smith v. Reeves*, 178 U. S. 436, and must be absolutely governed by it. That case was one against the Treasurer of California, brought under a statute closely similar to the one here. The relief sought there was the same as that sought here, and the questions raised here were raised and disposed of there. Upon the question whether that suit was one against California, this Court used the following language, which is directly in point here:

Is this suit to be regarded as one against the State of California? The adjudged cases permit only one answer to this question. Although the State, as such, is not made a party defendant, the suit is against one of its officers *as Treasurer*; the relief sought is a judgment against that officer *in his official capacity*; and that judgment would compel him to pay out of the public funds in the treasury of the State a certain sum of money. Such a judgment would have the same effect as if it were rendered directly against the State for the amount specified in the complaint. This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the State and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the

parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent. *Tindal v. Wesley*, 167 U. S. 204, 221, and authorities there cited. In the present case the action is not to recover specific moneys in the hands of the State Treasurer nor to compel him to perform a plain ministerial duty. It is to enforce the liability of the State to pay a certain amount of money on account of the payment of taxes alleged to have been wrongfully exacted by the State from the plaintiffs. Nor is it a suit to enjoin the defendant from doing some positive or affirmative act to the injury of the plaintiffs in their persons or property, but one in effect to compel the State, through its officer, to perform its promise to return to taxpayers such amount as may be adjudged to have been taken from them under an illegal assessment.

The case, in some material aspects, is like that of *Louisiana v. Jumel*, 107 U. S. 711, 726-728. That was a proceeding by mandamus against officers of Louisiana to compel them to use the public moneys in the state treasury for the retirement of certain bonds issued by the State but which it subsequently refused to recognize as valid obligations and directed its officers not to pay. This court said: "It may be, without doubt, easily ascertained from the accounts how much of the money on hand is applicable to the payment of this class of debts; but the law nowhere

requires the setting apart of this fund any more than others from the common stock. In the treasury all funds are mingled together, and kept so until called for to meet specific demands * * *. The remedy sought, in order to be complete, would require the court to assume all the executive authority of the State, so far as it related to the enforcement of this law, and to supervise the conduct of all persons charged with any official duty in respect to the levy, collection, and disbursement of the tax in question until the bonds, principal and interest, were paid in full, and that, too, in a proceeding in which the State, as a State, was not and could not be made a party. It needs no argument to show that the political power cannot be thus ousted of its jurisdiction and the judiciary set in its place. When a State submits itself, without reservation, to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the State has by its act of submission allowed to be done; and if the law permits coercion of the public officers to enforce any judgment that may be rendered, then such coercion may be employed for that purpose. But this is very far from authorizing the courts, when a State cannot be sued, to set up its jurisdiction over the officers in charge of the public moneys, so as to control them as against the political power in their administration of the finances of the State. In our opinion, to grant the relief

asked for in either of these cases would be to exercise such a power.

We are clearly of opinion that within the meaning of the constitutional provisions relating to actions instituted by private persons against a State, this suit, though in form against an officer of the State, is against the State itself. *In re Ayers*, 123 U. S. 443; *Pennoyer v. McConaughy*, 140 U. S. 1, 10.

This disposes of the present question without the necessity of further argument or the citation of other authorities.

III.

The Sovereign may Limit its Consent to be Sued to Its Own Courts.

On principle, and according to the decision, the consent of the Sovereign to be sued may be coupled with the condition, expressed or implied, that the suit be brought in its own courts, to the exclusion of the Federal courts. *Smith v. Reeves*, 178 U. S. 436; *Murray v. Wilson Distilling Company*, 213 U. S. 151; *Virginia Coupon Cases*, 114 U. S. 270; *Chandler v. Dix*, 194 U. S. 590; *Beers v. Arkansas*, 61 U. S. 527-529.

In *Smith v. Reeves*, *supra*, at page 445, the court said:

In the present case the suit is one to compel an officer of the state, by affirmative action on his part, to perform or comply with a promise of the state as defined in its political

code, and therefore, as we have said, it is a suit against the state. Nothing heretofore said by this court justifies the contention that a state may not give its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal courts—subject always to the condition, arising out of the supremacy of the Constitution of the United States and the laws made in pursuance thereof, that the final judgment of the highest court of the state in any action brought against it with its consent may be reviewed or reexamined, as prescribed by the act of Congress, if it denies to the plaintiff any right, title, privilege, or immunity secured to him and specially claimed under the Constitution or laws of the United States.

In our judgment it was competent for the state to couple with its consent to be sued on account of taxes alleged to have been exacted under illegal assessments made by the state board, the condition that the suit be brought in one of its own courts. Such legislation ought to be deemed a part of the taxing system of the state, and cannot be regarded as hostile to the general government, or as trenching upon any right granted or secured by the Constitution of the United States. If the California statute be construed as referring only to suits brought in one of its own courts, it does not follow that injustice will be done

to any taxpayer whose case presents a Federal question. For, if he be denied any right, privilege or immunity secured by the Constitution or laws of the United States and specially set up by him, the case can be brought here upon writ of error from the highest court of the state.

And in *Murray v. Wilson Distilling Co., supra*, at page 172, this Court said:

It is elementary that even if a State has consented to be sued in its own court by one of its creditors, a right would not exist in such creditor to sue the State in a court of the United States (citing *Smith v. Reeves*, and *Chandler v. Dix, supra*).

A limited consent to be sued in the local courts only does not deprive a litigant of any right, as, for instance, the asserted right to go into a Federal court. Until the consent is given the litigant has no right to submit his suit against the Sovereign to any tribunal whatever. That he can go into any forum is a matter of grace, not of right.

Limited consent to be sued involves no element of discrimination against any class of litigants. In the *Reeves case*, for instance, it was argued that California could not deprive the corporation which the plaintiff represented of its right to go into a Federal court because it was incorporated under an act of Congress for purposes authorized by the Constitution and laws of the United States. The con-

tention was rejected upon principle and as having been disposed of in *Hans v. Louisiana*, 134 U. S. 1, in which case this court held that a State could not be sued in a Circuit Court of the United States by one of its own citizens, upon a suggestion that the case is one that arises under the Constitution and laws of the United States, saying:

We deem it unnecessary to repeat or enlarge upon the reasons given in *Hans v. Louisiana* why a suit brought against a state by one of its citizens was excluded from the judicial power of the United States, even when it is one arising under the Constitution and laws of the United States. They apply equally to a suit of that character brought against the state by a corporation created by Congress. Such a suit cannot, consistently with the Constitution, be brought within the cognizance of a circuit court of the United States without the consent of the state.

It is said in the opinion below that the United States Court was created in Porto Rico expressly for the purpose of giving foreign corporations and persons not citizens of the Island a forum free from local prejudice and bias, and that, therefore, a foreign corporation could not be deprived of its assumed right to bring any suit it pleased in the Federal court. This is fallacious. The Federal court was created to exercise in Porto Rico the judicial power of the United States. Its object and purpose are the

same as those of a Federal court on the mainland. (See Sec. 34 of the Organic Acts.) The right to sue in a Federal court based on diversity of citizenship does not obtain when the defendant is a Sovereign. The rights of foreigners and foreign corporations to sue The People of Porto Rico are no greater than those of citizens of the island to do likewise, and in all cases are measured and defined by the act of the Legislature granting the consent. Without that consent neither a citizen of Porto Rico nor a citizen of the United States nor an alien can sue Porto Rico in any court. Mere consent by the Sovereign to suit in a local court does not confer upon a plaintiff any more rights under the Constitution and laws of the United States than he had before. As was said in the *Virginia Coupon Cases*, 114 U. S. 270, 286,

It is true, that no remedy for a breach of its contract by a State, by way of damages as compensation, or by means of process to compel its performance, is open, under the Constitution, in the courts of the United States, by a direct suit against the State itself, on the part of the injured party, being a citizen of another State, or a citizen or subject of a foreign state.

The above proposition is too well established to require or to justify further discussion or citation of authorities.

IV.

The Statute in Question Does Not Grant the Consent of The People of Porto Rico to be Sued in the Federal Court.

For convenience, the Act of 1911 is set out in full in the margin below.¹ That act contained the only consent ever given by The People of Porto Rico to subject themselves to suit in connection with the assessment and recovery of taxes. In terms, it expressly excludes all other remedies than the one therein provided. Whatever remedy exists for the recovery of taxes claimed to be unlawfully levied and collected must be found in that act. No question is raised as to the validity of the statute nor of the power of the Legislature to enact it. While it is true the statute does not expressly name or designate the court in which the suit against the Sovereign may be

¹AN ACT PROVIDING FOR THE PAYMENT OF TAXES UNDER PROTEST, ESTABLISHING A PROCEDURE FOR THE RECOVERY THEREOF, AND FOR OTHER PURPOSES.

Be it enacted by the Legislative Assembly of Porto Rico:

SECTION 1. That in all cases in which an officer charged by law with the collection of revenue due the Government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

SEC. 2. Be it further enacted that, upon his making such payment, the officer or collector shall pay such revenue into the Treasury of Porto Rico, giving notice at the time of the payment to the Treasurer, that the same was paid under protest.

SEC. 3. Be it further enacted that, the party paying said revenue under protest may, at any time within thirty days after

brought, still by the clearest implication the term, "having competent jurisdiction thereto," read in the light of the entire act, has reference solely to the insular courts of Porto Rico. It is clear that the true intent and meaning of the statute is to create a remedy to be applied by the insular courts, and that the consent to be sued is a consent to be sued only in those courts; that it would do violence to the statute to deduce out of it an implication of consent to suit in the Federal court; and that the remedy thus granted could not in any event be enforced in the Federal court because it does not involve an exercise of the judicial power of the United States.

making said payment, and not longer thereafter, sue the said Treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected as not being due from said party to the Government, for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded, and thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

SEC. 4. Be it further enacted that, there shall be no other remedy in any case of the collection of revenue, or attempt to collect revenue illegally.

SEC. 5. Be it further enacted that, no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue, either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which, for any reason, any person shall claim that

I. The Nature and Incidents of the Remedy Created Show Conclusively an Intention on the Part of the Legislature to Commit the Matter Solely to the Insular Courts.

Under the statute suit may be brought against the Treasurer "in the court having competent jurisdiction thereto." The phrase quoted is not self-explanatory and its meaning must be determined in the light of the entire act and its purpose. Of course it does not mean what the court below seemed to think it meant, any court that may be "competent" in point of ability or prestige, or as having the necessary writs and processes at its command. This Court, for instance, would be thoroughly competent in that sense, but it would have no "jurisdiction." The important word in the phrase is "jurisdiction," to which "competent" really adds nothing. The

the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

SEC. 6. Be it further enacted that, Sec. 12 of the Act of March 8, 1906, entitled "An Act to define injunctions and to prescribe when they may be issued, and to repeal an Act authorizing injunctions, approved March 1, 1902, and all laws in conflict herewith," is hereby amended so as to read as follows:

"SEC. 12. An injunction may be granted, upon the petition of The People of Porto Rico, to enjoin and suppress the keeping and maintaining of a common nuisance. The petition shall be verified by the fiscal of the district in which the common nuisance exists, or by the Attorney General, upon information and belief, and no bond shall be required."

SEC. 7. Be it further enacted that, this Act shall take effect immediately upon its approval.

Approved March 9, 1911.

Legislature, then, has consented that the Government may be sued in the court having jurisdiction. The act is conferring jurisdiction upon some court which did not have it before. It is creating a remedy for alleged wrongful taxation, to be enforced in some court the jurisdiction of which is of such a kind and nature as to allow it to apply the remedy. The "jurisdiction" of a court to entertain the proceeding and administer and enforce the remedy must be tested by the nature of the proceeding and the remedy. If the proceeding and remedy provided are of such a nature that they can be had and applied in their entirety only in the insular courts, the Legislature, by clear necessity, must be held to have intended to submit the question only to the local tribunals. All the more so, if the Federal court, by the law of its creation, is limited in such a way that it may not enforce the remedy.

The act provides that—

- (1) The tax must be paid under protest;
- (2) Within thirty days a suit may be brought against the Treasurer;
- (3) The court may certify of record that the tax was wrongfully paid and ought to be refunded;
- (4) The repayment shall be paid out of the treasury; and—
- (5) "*Either party to said suit shall have the right of appeal to the Supreme Court.*"

The last provision, nothing else being considered, is of such a character as to compel the conclusion that the Legislature of Porto Rico intended the remedy to be pursued solely in the courts of Porto Rico. The forum having "competent jurisdiction" is one from whose action an appeal is given to the *Supreme Court*. Having due regard for the political relation existing between the Federal Government and the Government of Porto Rico, for the judicial power of the United States, for the political and judicial system of Porto Rico and the powers of the local Legislature, and for the general considerations which surround the consent of a Sovereign to suit, the Supreme Court referred to obviously is the Supreme Court of Porto Rico. It would be absurd to assume that the words could relate to the Federal Supreme Court, whose jurisdiction is dependent upon the Constitution and laws of Congress, and cannot be enlarged or abridged by the action of any other body. Immunity from suit has been waived, but in what court did the Legislature intend the questions to be litigated? Clearly and necessarily only in a court from whose decisions an appeal can lie to the Supreme Court of Porto Rico. Only such a court has "competent jurisdiction."

There is no appeal from the District Court of the United States for Porto Rico, to the Supreme Court of Porto Rico. The two courts belong to different systems. The judicial power of the United States

as exercised by the District Court of the United States for Porto Rico, cannot be exercised or controlled in any way by the courts of Porto Rico. Appellate jurisdiction over the judgments of that Federal Court belongs to the higher Federal courts only, and is solely within the control of Congress. There is no provision for the removal under any circumstances of a case from the Federal court to the Supreme Court of Porto Rico. Therefore, it seems beyond dispute that the intention of the Legislature was to create a remedy solely in the insular courts, and that by this act The People of Porto Rico have consented to have their acts, in this respect, reviewed only by their own courts.

The practical effect of this construction is, of course, in no way detrimental to the assumed rights of any person. In every case in which an appeal to the higher Federal courts lies from the decision of this Federal court, the same appeal lies from the decision ^{to} the Supreme Court of Porto Rico. The construction urged, therefore, does not in any way affect such appeals, if they lie in any case, and operates merely to limit the courts of first instance. If the suit can be brought only in the insular courts a plaintiff has *two* appeals instead of one: (1) to the Supreme Court of Porto Rico, and (2) to the higher Federal court, assuming, for the moment, that appeal to such courts is possible in any case under the act.

It was argued below, and may be argued again here, that the appellate provision applied only to cases which were brought in the insular courts, and became inoperative if the suit were brought in the Federal court. This is clearly unsound. If the plaintiff can elect to bring his suit in the Federal court he can thereby deprive The People of Porto Rico of the clear right of appeal, expressly provided by the act, to the Supreme Court of Porto Rico. If the Legislature intended questions of taxation to be reviewed by the Supreme Court of Porto Rico in any case, it must have intended that they should be reviewed in all cases. No reason can be suggested for any such discrimination, and any construction so unreasonable, unjust, and absurd, should be rejected.

In *Smith v. Reeves, supra*, where the statute provided that the Attorney General could demand that the case be tried in the Superior Court of the County of Sacramento, this Court held that this right to a trial in the State court was in itself sufficient to show an intention to commit the whole matter to the local courts, although we might observe that in a particular case the Attorney General might even desire a trial in the Federal court. So, here, it is submitted that the right of appeal to the Supreme Court of Porto Rico, expressly given by the statute, is an even stronger and more persuasive indication of the legislative intention to commit the matter exclusively to the local courts. It is difficult to escape that conviction.

2. The Judicial Power Conferred Upon the Federal Court for Porto Rico Does Not Authorize It to Exercise the Power of Certification Conferred by the Act In Question.

Even if the Legislature had intended to consent to have these tax questions litigated in the Federal court, that intent would appear to fail of effect, because the certification provided for by the Act would seem to be beyond the judicial power of the United States. The proceeding is a part of the local system of taxation. The certification does not seem to be a judgment enforceable as such. Having made the finding, it is difficult to see what further step the Federal court could take under its powers. An enforceable judgment or decree is the only kind of final action that a court of the United States has jurisdiction to take.

Mandamus, it was suggested below, would lie to compel the Treasurer to perform his duty under the certification, but the right to issue that writ would in no way confer power to exercise the functions resulting in the certification, and mandamus would not be, even in form, an entreaty of the certificate or of the promise of the Sovereign. Mandamus also lies against the individual and not the sovereign. An action against the Sovereign in its inception and purpose cannot be converted into an action against an individual when its purpose has been achieved, and, by rendering an enforceable judgment against the individual, cure the defective jurisdiction to render an unenforceable certificate. If mandamus

should lie at all, it would be within the jurisdiction of the insular courts under the provisions of the Act to Establish the Writ of Mandamus, approved March 12, 1903 (*Laws of Porto Rico*, 1903, page 113). But the United States courts have no power to issue mandamus as an original writ. In the Federal judicial system it is an ancillary writ, that can issue only in aid of existing jurisdiction. *Rosenbaum v. Bauer*, 120 U. S. 450; *Davenport v. County of Dodge*, 105 U. S. 237; *Chickaming v. Carpenter*, 106 U. S. 663; *Covington Bridge Company v. Hager*, 203 U. S. 109. It is doubtful if the remedy provided by the act is a judicial remedy at all, as that term is understood in its relation to the judicial power of the United States. See *Railroad Company v. Tennessee*, 101 U. S. 337, 340; *Baltzer v. North Carolina*, 161 U. S. 240; *Southern Alabama Railroad v. Alabama*, 101 U. S. 832.

The courts of the United States are limited to the exercise of judicial powers only. The same is true of the Federal Court for Porto Rico which, though a legislative court, has by the act of its creation (Section 34, Organic Act) the jurisdiction of a district court here at home. Of course, Congress could have conferred upon it other powers (*McAllister v. United States*, 141 U. S. 174, 181), but it did not do so. The judicial power with which these courts are vested comprehends only the power to render judgments and decrees that can be enforced without

reference to any other power. *Gordon v. United States*, 117 U. S. 697. That power must not be exerted in a case to which it does not extend, even if both parties desire it. *Mansfield Railway Company v. Swan*, 111 U. S. 379, 383.

3. Consent of the Sovereign to Be Sued, Being in Derogation of Sovereignty, Must Be Established in Clear and Unmistakable Terms, and Cannot Be Established or Enlarged by Construction.

Statutes conferring such consent must be strictly construed. Whatever doubt may exist as to the jurisdiction of the court, must be resolved in favor of the Sovereign. This rule is a necessary part of the doctrine of sovereign immunity. It runs through all the decisions of this Court involving the doctrine, and it has been expressly declared in numerous State decisions. No case has been found in which the jurisdiction of a court to entertain such a suit has rested upon implication.

In the *Reeves* case, 178 U. S. 436, 441, this Court clearly applied the rule to the statute conferring consent there under consideration. And in *Chandler v. Dix*, 194 U. S. 590, this Court refused to enlarge by construction the consent to sue the State given by a Michigan statute, so that it would include the Federal courts, on the ground that the statute showed an intention to confine the suits to the State court.

In *Stanley v. Schwalby*, 162 U. S. 255, 269, this Court said:

It is a fundamental principle of public law, affirmed by a long series of decisions of this

Court, and clearly recognized in its former opinion in the case, that no suit can be maintained against the United States, or against their property, in any court, *without express authority of Congress.* 147 U. S. 512. See also *Belknap v. Schild*, 161 U. S. 10.

See also *Oregon v. Hitchcock*, 202 U. S. 60; cf. *Minnesota v. Hitchcock*, 185 U. S. 373.

The principle is thus expressed by the Court of Appeals of New York in *Saranac Co. v. Roberts*, 195 N. Y. 303, 320:

That no action can be maintained against the government, State or Federal, except by its consent, *express and not implied*, and to be found in some special statute, is elementary law, and it is settled upon authority that where, in reality, the suit against a State officer is a suit against the State itself, it cannot be maintained.

In an earlier case the New York Court of Appeals said:

Authority to render a judgment against the State or Government, in one of its own courts, cannot be implied, but *must be express.*

People v. Denison, 84 N. Y. 271, 282.

In *Murdock Co. v. Commonwealth*, 24 N. E. 854, the Supreme Judicial Court of Massachusetts thus stated the rule:

The Commonwealth can be sued in its own courts, undoubtedly, *where clear statutory authority for that purpose has been given by the*

Legislature; but, in view of its sovereignty, the intent to confer such authority should be clearly manifested.

And in *Troy & Greenfield Railroad v. Commonwealth*, 127 Mass. 43, 46, the rule was stated in this language:

The Commonwealth cannot be impleaded in its own courts, except by its own consent clearly manifested by the legislature.

In *Asbell v. State*, 55 Pac. 338 (Kansas, 1898), the officers of the State of Kansas were summoned on a motion for a new trial. The question involved was that of the construction of a statute providing for a motion for a new trial. At page 339 the Court said:

To compel a State, upon theories of doubtful statutory interpretation, to appear as defendant suitor in its own courts, and to litigate with private parties as to whether it had abnegated its sovereignty of exemption, would be intolerable. Except as otherwise provided by the Eleventh Amendment to the Federal Constitution, the States, from the nature of their sovereign character, are absolved from the obligation to respond to the demands of suitors in court * * *

In its grace and favor it may waive its sovereign right of exemption, but the waiver must be made in express terms, or, at least, in terms so clear and unambiguous as to necessarily force upon the mind the implication of waiver.

A similar case is *State v. Appleton*, 84 Pac. 753, 754 (Kansas, 1906), in which the court said:

A prerogative of sovereignty which belongs to a State is that it cannot be brought into court to answer claims made against it unless express consent to that end has been given. The power to give consent rests in the legislature * * *. There is nothing in these sections indicating a legislative purpose of abrogating the prerogative of sovereignty and the giving of consent that the State may be sued in either civil or criminal cases. Courts cannot resort to forced constructions or questionable implications to find such consent. The rule is that as statutes giving the power to sue the State are in derogation of a sovereign power, they should be construed strictly * * *. The legislature has never in clear terms authorized the institution of such a proceeding against the State.

In this case, to deduce out of the Act of the Legislature of Porto Rico consent to be sued in the Federal court, is to violate an established canon of construction, the strict observance of which is necessary to the preservation of a sovereign right.

V.

Jurisdiction of This Suit and of the Defendant was Not Conferred by the Appearance and Answer of the Attorney General and the Treasurer of Porto Rico, for Consent of the Sovereign to Suit can be Granted, and Exemption from Suit Waived, only by Act of the Legislature.

In the court below there was a fundamental misconception as to this question of jurisdiction. There was a failure to make the distinction, lying at the very base of the question of jurisdiction, between a suit against the Sovereign and one against an individual. The question was considered there as though it were confined to the narrow phase of jurisdiction over a party to an action which was within the power of the court to try and determine. Obviously such was not the basis of the difficulty, and considerations thus narrowly limited must inevitably result in erroneous conclusions. The question raised by the various motions to dismiss was a much broader one. It was one touching the organic power of a court, under our system of government, to exercise authority over questions directly involving the Sovereign, political therefore in character, and not subject to judicial determination without the Sovereign consent. *It is a question, therefore, of jurisdiction over the subject-matter, and not of the person.* "Consent may waive an objection so far as respects the person, but it cannot invest a court with a jurisdiction which it does not by law possess over the subject-matter." (*Minnesota*

v. *Hitchcock*, 185 U. S. 373; also *Reid v. United States*, 211 U. S. 529.)

As the only method whereby a court can be vested with power to entertain a suit against the Sovereign is by act of the Legislature, so, when the subject is viewed from the other side, the only method known to the law whereby the immunity from suit which attaches to a Sovereign can be waived is through legislative authority.

An unauthorized appearance by the law officers of the Sovereign, or any other officer, is of no effect whatever and cannot bind the Sovereign. The following quotations from leading cases must put this proposition beyond doubt:

Adams v. Bradley, Federal Case No. 48:

The State cannot be made a party at all without its consent, and the assumed appearance of the District attorney or the Attorney General without express authority of law does not constitute a consent. * * * However this may be, it is clear that this section of the statute does not in terms or by any reasonable implication authorize private parties to sue the State, and we have seen from the authorities cited that where there is no authority of law for suing the State an assumed authority of the Attorney of the State to appear does not confer jurisdiction over the State.

If the State can be bound by the judgment against Slingerland it must necessarily have been substantially and in fact, though not in

form, a party to the action, and yet it cannot be sued without its express assent given by law; and where the State cannot be sued the decisions are to the effect that the fact of its having been sued and the State's attorney having in fact appeared does not change the phase of the question at all. It has been decided in at least two cases by the Supreme Court of the United States that the appearance by the United States attorney without authority does not give jurisdiction over the United States.

New Orleans, etc., R. R. Co. v. City of New Orleans,
34 La. Ann., 429, 433:

The intervention of the Attorney General in this case in the name of the State unauthorized by legislative action does not bind the State to any judicial averment or pleadings of such intervention.

Case v. Terrell, 11 Wall 199, at page 202:

We are quite at a loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must suppose that it is claimed on the ground that the Receiver and Comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the Government to the jurisdiction of the court.

As to the Receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its

creditors, and does not in any sense represent the Government.

Nor can such authority be conceded to the Comptroller of the Curreney. It may very well admit of doubt whether it is within his competency to submit himself, in the exercise of duties specially confided to him by Acts of Congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. We are not called upon here to decide this question. But we have no hesitation in holding that however he may submit himself to the jurisdiction of those courts, and consent to be governed in his official action by their decrees, so far as they affect rights of parties who may come into court and be impleaded in the same suit, he has no authority to subject the United States to such jurisdiction, and to submit the rights of the Government to litigation in any court, *without some provision of law authorizing him to do so.*

Carr v. United States, 98 U. S. 433, 438:

It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the District Attorney and additional counsel to aid in the defense. But we do not think that any such inference can be legally deduced from the action of the Secretary of the Treasury. He may have deemed it prudent to assist the officers who

were sued, without intending to waive any of the rights of the Government. And, in fact, he had no authority to waive those rights.

United States v. Lee, 106 U. S. 196, 205:

There is in this country, however, no such thing as the petition of right, as there is no such thing as a kingly head to the nation, or to any of the States which compose it. There is vested in no officer or body the authority to consent that the State shall be sued except in the law-making power, which may give such consent on the terms it may choose to impose.

Stanley v. Schwalby, 162 U. S. 255 at page 270:

The United States, by various Acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War, nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States, or their property, to the jurisdiction of the court in a suit brought against their officers. *Case v. Terrell*, 11 Wall. 199, 202; *Carr v. United States*, 98 U. S. 433, 438; *United States v. Lee*, 106 U. S. 196, 205.

Northern Bank of Kentucky v. Stone, 88 Fed. 413, at page 418:

The fact that the Attorney General appeared on behalf of the commonwealth in this

litigation when it reached the court of appeals is not a circumstance which could be held to bind the commonwealth and all of its agencies by the litigation. There were a great many tax cases pending before the court at the same time. In some of these cases the commonwealth was a party, and the Attorney General was therefore present to argue the question on its behalf in those cases. Even if this had not been the case, the case of *Carr v. United States*, 98 U. S. 433, shows that the appearance of the Attorney General on behalf of the counties could not bind the State.

ANALYSIS OF AUTHORITIES RELIED UPON BY OUR
ADVERSARY IN THE TRIAL BELOW.

Clark v. Barnard, 108 U. S. 436.

In this case, under the order of the court, directed to the City of Boston—a municipal corporation—a fund was paid into court. To this fund the State of Rhode Island put in an affirmative claim nearly two years after the institution of suit (pages 445, 446). An attempt had been previously made to join the state treasurer of Rhode Island as a defendant in a suit in equity involving the fund. The state treasurer's demurrer, on the ground of want of jurisdiction, had been overruled by the court below. This Court, in deciding the question, did not consider the correctness of this ruling of the lower court, saying, at page 447:

The first question for determination on this appeal is that of jurisdiction, raised first by the

demurrer and afterwards by the answer of Clark, general treasurer of the State of Rhode Island, on the ground that the suit was in effect brought against a State by citizens of another State, contrary to the Eleventh Amendment to the Constitution of the United States.

We are relieved, however, from its consideration by the voluntary appearance of the State in intervening as a claimant of the fund in court. The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit, otherwise well brought, in which a State had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a voluntary submission to its jurisdiction; while, of course, those courts are always open to it as a suitor in controversies between it and citizens of other states. In the present case the State of Rhode Island appeared in the cause and presented and prosecuted a claim to the fund in controversy, and thereby made itself a party to the litigation to the full extent required for its complete determination. It became an actor as well as defendant, as by its intervention the proceeding became one in the nature of an interpleader, in which it became necessary to adjudicate the adverse rights of the State and the appellees to the fund, to

which both claimed title. The case differs from that of *Georgia v. Jesup*, 106 U. S. 458, where the State expressly declined to become a party to the suit, and appeared only to protest against the exercise of jurisdiction by the court. The circumstance that the appearance of the State was entered without prejudice to the demurrer of Clark, the general treasurer, does not affect the result. For that demurrer could not reach beyond the question of the right to sue Clark by reason of his official character, which became insignificant when the State made itself a party; and in point of fact, the bill was framed to avoid the objection, by charging Clark as a wrongdoer in his individual capacity. For the groundwork of the bill, whether it be regarded as directed against the officer or the state, is, that the transaction throughout was void, as *ultra vires* the corporation. And this presents the next question to be considered.

It appears, therefore, that the case of *Clark v. Barnard* was decided by this Court as a suit by the State, not a suit against the State; therefore, the question of the immunity of the State from uninvited suit was not involved in that opinion.

Gunster v. Atlantic Coast Line, 200 U. S. 273.

An examination of this case, again, shows that the case was one in which the Attorney General, pursuant to statutory mandate, appeared in court in defense of the rights of the State (page 286). This case is,

therefore, no authority for the proposition that the appearance of the Attorney General, without statutory mandate, renders the Sovereign liable to a suit to which it has not, by statute, consented. The idea of the necessity of statutory consent to be sued runs throughout the opinion.

State v. Lazarus, 5 So. 289.

This case may be searched from beginning to end for a single word supporting the position of our adversary.

Stoner v. Rice, 22 N. E. 968.

Here, again, the slightest examination of the facts in the case shows that no attempt was made to sue the State, or any of its officers. A suit was instituted between certain parties involving the title to certain land. The State claimed title, and asserted it by the action of its auditor in intervening and asking to be joined as a party to the suit. Here, again, we are dealing, not with the power to sue the Sovereign without its consent, but with the power of the Sovereign to sue, which is undisputed. The Sovereign having power to sue, the *Rice case* held it made no difference that, in the exercise of that power, it became under the practice of the court, technically a party defendant—the proceedings being in the nature of interpleader proceedings—rather than technically the party plaintiff. The *Rice case* is therefore on all fours with the case of *Clark v. Barnard*, *supra*, and goes no further. In the present case The People of Porto

Rico are not asking relief; they are not making an affirmative claim to any fund in court; they are asserting immunity from the control of the court of funds in their own possession. Such cases as those cited, cannot, by any stretch of the mind, be held to involve the question of whether or not the Sovereign, as a Sovereign, is immune to the process and decision of a court in litigation to which it has not consented.

The exact scope of *Clark v. Barnard* was clearly stated in *Lowry v. Sinking Fund*, 1. S. E. 141, 144.

People v. Detroit, 121 N. W. 814.

In this case the statute authorized the particular suit against the State; therefore the authority of the attorney general, or any state officer, to waive the State's immunity by appearing and answering in a suit to which the State had not consented by legislative action, was in no way involved.

SOME DECISIONS OF THIS COURT WHICH REQUIRE
SOME COMMENT.

People of Porto Rico v. Ramos. (232 U. S. 627.)

In that case, while an action of ejectment involving title to real property was pending, the Attorney General of Porto Rico appeared and represented to the court that The People of Porto Rico had rights in the property in controversy by escheat and were therefore interested parties to the action; and Porto Rico was thereupon made a party defendant over the plaintiff's objection. Subsequently, the Attorney

General objected to the jurisdiction of the court to entertain the suit against Porto Rico in that instance, and when that objection came to be reviewed here, this Court rejected the contention and after referring to the fact that the Attorney General had voluntarily appeared after due consideration and requested that The People of Porto Rico may be made a party on the ground of interest in the controversy, said, *inter alia* (p. 632):

Porto Rico, therefore, through its Attorney General not only gave its consent to be a party to the cause but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause.

The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step.

The language of the opinion, considered aside from the particular facts of the case, is such as might justify the conclusion that what the court there decided was that the mere voluntary appearance of the Attorney General of Porto Rico in a suit brought against The People of Porto Rico, amounts to the consent of the Sovereign to be sued, or a waiver of the sovereign immunity. If such is the purport of the

opinion, then all that can be said of it is, that it is irreconcilable with the established rule of law which this Court has never before failed to recognize and uphold. The decision can be made to conform to the established precedents of this Court, including the *Rosaly case* decided shortly before, only by distinguishing it, and I think it ought so to be distinguished, in the light of the facts and the nature of the case, and by comparing it with the *Clark case* (108 U. S. 436), to which it bears close analogy. True, in the *Ramos case* Porto Rico was denominated a party defendant, or a sole defendant, but if it became a party to the litigation it did so by its voluntary intervention to protect rights it asserted in the estate in controversy. In such a case the thing of importance is to be found not in the mere technical denomination of the intervening Sovereign as a party to the suit, but in the substantial fact that the Sovereign thus became *an actor*, asserting a right against another. This seems to have been what was in the mind of the Court, for in distinguishing the case from the *Rosaly case*, it said (page 631):

This case, however, is not within the rule. In that case Porto Rico was a defendant *in the first instance*. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy and against the opposition of the plaintiff (defendant in error), it was made a party defendant.

The action, then, was *by*, not *against*, Porto Rico.

If the decision in the *Ramos case* cannot be rested upon this distinction, then, with deference, it is unsound.

And, in a more recent case, *Porto Rico v. Emmanuel* (235 U. S. 251), Mr. Justice Pitney, speaking for the Court, after referring to the decision in the *Rosaly case*, uses this language:

Upon the face of the present record, it may be doubtful whether defendant fairly raised in the pleadings the question of its general immunity from action, or whether, on the other hand, its pleadings, construed as a whole, did not rather amount to a consent to litigate the merits (p. 257).

This expression would indicate it to have been the view of the court that consent to suit, in the case of Porto Rico, might be conferred by a mere pleading. But that expression was but *dictum*, and, furthermore, the merits of that case involved the construction and application of a statute of Porto Rico which gave a general consent to suit in certain cases.

These Two Cases in the Light of the Rosaly Case.

Those two decisions seem to have been influenced by the fact of the appearance of the Attorney General of Porto Rico, inconsonantly with the general rule and with the decision in the *Rosaly case*. An examination of the record in this latter case shows that in that case the Attorney General of Porto Rico

appeared and answered without raising the question of jurisdiction at all in the *nisi prius* court, and that there was no question of jurisdiction raised, or claim made, as to the immunity of The People of Porto Rico from suit without their consent until the case came before the Supreme Court of Porto Rico (16. P R. R. 489). That fact was apparent upon the record here, and the opening paragraph of the opinion rendered by this Court in that case clearly shows that, though in the mind of the Court, it was without effect upon the decision.

In any event, if either of the above cases contains aught that conflicts with the general rule which this Court has so firmly upheld as a necessary principle of public law, and which applies in full force to the Government of Porto Rico, then, to that extent, those decisions should be modified.

C.

THE JUDGMENT IS WRONG ON THE MERITS.

I.

The Shares of Stock in Question Were a Part of the Capital of the Company "Employed in the Transaction of Business in Porto Rico," and the Assessment of the Same as Such Was in All Respects Lawful.

(a) *Jurisdiction of Porto Rico to impose the tax.*

The power to tax arises out of the jurisdiction either of the person or the property. As stated by

Chief Justice Waite (*Tappan v. Merchants National Bank*, 19 Wall. 490, 499):

The power of taxation by any state is limited to persons, property, or business within its jurisdiction. * * * If the state has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

While, in the absence of legislation, shares of stock are personal property the situs of which follows the residence of their owner (2 Thomp. Cor., Sec. 2847, *et seq.*), the Legislature may change the rule and exercise the taxing power "wherever property or business can be found within the jurisdiction, out of which the payment of the tax can be coerced" (*id.*, Sec. 2849).

With respect to the power of the State to tax foreign corporations, it is undisputed that one State cannot tax a corporate franchise issued by another, but practically the same result is accomplished when a State imposes a tax upon a foreign corporation for the privilege of exercising its corporate franchise within the limits of the taxing State. Thus in New York, the statute provides that the tax upon a foreign corporation "is to be computed upon the basis of the capital employed in this State" (Laws, 1896, Section 182, chap. 908). This has been construed by the courts as covering only such of the capital as

was represented by the value of the property, whether of money, goods or other tangible things (*People, Seth Thomas Clock Co. v. Wemple*, 133 N. Y. 323). And in *People, Ex rel. A. J. Johnson Co. v. Roberts* (139 N. Y. 70, 74, 45 L. R. A. 126, 53 N. E. 685), it was said:

So far as the franchises themselves of the foreign corporation are concerned, they are beyond the reach of our tax laws. They are derived from the governments to which they owe their creation, and can only be subjected to taxation by the laws of those governments. When it is sought to exercise them within this state, the condition of the right to do so is the liability to taxation and control by the legislature, so far as the capital *can be seen to be employed in the business here.*

A broader rule is taken by the Supreme Court in *Maine v. Grand Trunk Railroad Co.* (142 U. S. 217), where it is stated that the validity of an excise tax upon a corporation for the privilege of exercising its franchise within the State is not determined by the mode adopted in fixing its amount for any specific period, or the times of its payment, but that the whole field of inquiry into the extent of revenue from sources at the command of the corporation is open to the consideration of the State in deciding what portion of its business is done within the State and what may justly be exacted for the privilege. That a State may tax a foreign corporation on the

portion of its capital employed in business within the State, see *Horn Silver Mining Co. v. New York*, 143 U. S. 305; *New York v. Roberts*, 171 U. S. 658. As to the status and employment of capital within a State, see *People v. Campbell*, 138 N. Y. 543, 139 N. Y. 68; *People v. Roberts*, 154 N. Y. 1; *People v. Roberts*, 8 Appeals Div., N. Y. 201. In determining the proportion of the capital employed in business within a State, it is proper to consider the value of its tangible property within the State as compared with the value of its entire tangible property. See *County Commissioners v. Old Dominion Steamship Co.*, V., 39 S. E. 18; *Maine v. Grand Trunk Railroad Co.*, 142 U. S. 217. The determination of the proportion of the capital employed within the State by the Comptroller will not be disturbed unless clearly erroneous. *People v. Horn Silver Mining Co.*, 105 N. Y. 76; *People v. Campbell*, 145 N. Y. 587; *People v. Roberts*, 82 Hun. 352.

It may be accepted, then, as supported by the authorities as well as on principle, that Porto Rico has jurisdiction to impose a tax on foreign corporations based on the amount of capital employed in business within its territory. What are the terms of the particular statute?

(b) *Construction of the Statute.*

Section 320 (Political Code, as amended September 3, 1910, page 38) provides that the assessment of every company "not incorporated in Porto Rico but

engaged in the transaction of business therein," other than banks and banking institutions, "shall be made in the manner provided by this title for the assessment of the property of institutions, corporations, and companies incorporated under the laws of Porto Rico: *Provided, however,* That in the determination of the actual present value of the capital of such corporations, *only such part of the capital of such corporations shall be considered and assessed as is employed in the transaction of business in Porto Rico*, but the amount of such capital shall in no case be less than the value of the real and personal property of such corporation or company situated in Porto Rico, including in such personal property all franchises or concessions granted said corporation or company under the laws of Porto Rico."

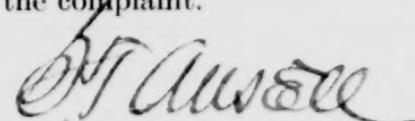
This statute in effect imposes a license tax on foreign corporations equivalent to the tax imposed upon the domestic corporation as to such part of the capital only as is employed in the transaction of business in Porto Rico. As this taxes the foreign corporations only in respect of the portion of their capital employed in business in Porto Rico, there can be no question of the equity of the tax or of the jurisdiction of Porto Rico to impose it.

The tax for the recovery of which this suit is brought was not imposed on the Development Company, but on the Sugar Company; that is, on the portion of the capital stock of the Sugar Company

invested in these shares. It is clear that the portion of the capital stock invested in these shares is employed in business in Porto Rico inasmuch as the Development Company does no business elsewhere than in Porto Rico, its only business being the operation of railroads in Porto Rico, principally for the transportation of persons and property incident to the business of the Sugar Company. Irrespective, therefore, of whether or not any tax was imposed on the capital stock of the Development Company, no information on that point being disclosed in this suit, the tax in question was properly imposed on the Sugar Company by reason of the fact that the capital stock invested in these shares was actually employed in business in Porto Rico and comes, therefore, within the terms of the statute imposing the tax, as well as within the authorities cited above with respect to the jurisdiction to tax foreign corporations.

CONCLUSION.

The judgment of the District Court should be reversed, and the case remanded to that court with directions to dismiss the complaint.



Attorney for Plaintiff in Error.





U. S. DISTRICT COURT, U. S.
PORTO RICO
DEC 26 1915
JAMES D. MAHER
CLERK

No. 280

In the Supreme Court of the United States.

OCTOBER TERM, 1915.

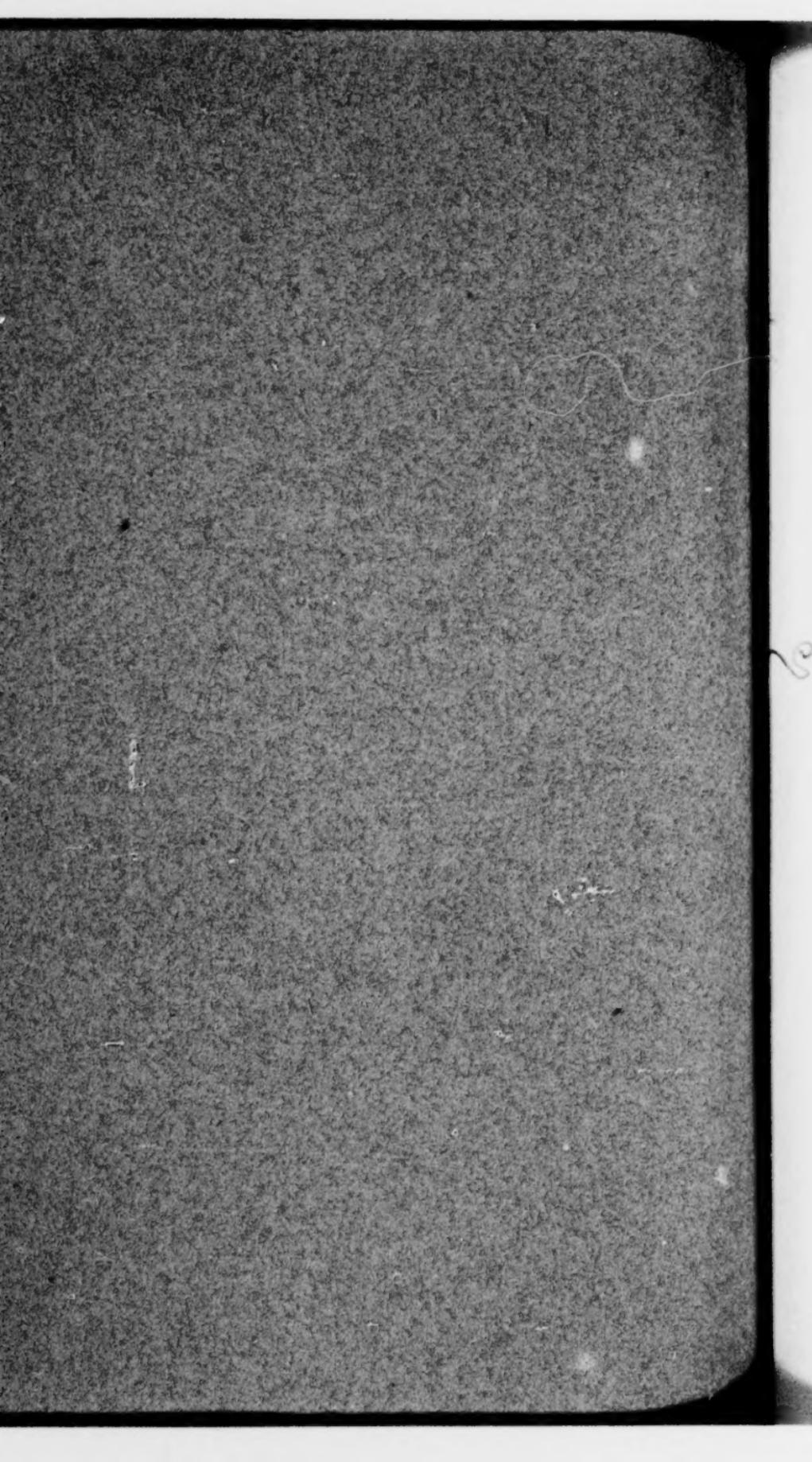
ALLAN H. RICHARDSON, as Treasurer of Porto Rico,
Plaintiff in Error,

v.

THE FAJARDO SUGAR COMPANY.

In Error to the District Court of the United States for
Porto Rico.

BRIEF FOR DEFENDANT IN ERROR.



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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915.

ALLAN H. RICHARDSON, as TREASURER
OF PORTO RICO,
Plaintiff in Error, }
v.
THE FAJARDO SUGAR COMPANY. }
No. 280.

IN ERROR TO THE DISTRICT COURT OF THE UNITED
STATES FOR PORTO RICO.

**BRIEF FOR THE FAJARDO SUGAR
COMPANY.**

Statement of the Case.

The writ of error herein is addressed to the District Court of the United States for the District of Porto Rico, to review a judgment of that court in favor of The Fajardo Sugar Company, a New York corporation, against the plaintiff-in-error Allan H. Richardson, as Treasurer of Porto Rico, in the sum of \$7,038. in an action brought by the said Company against the said Treasurer under a local Legislative Act to recover said amount, representing taxes for the fiscal year 1911-1912 assessed upon certain personal property of said company, to wit,

certain shares of the Capital Stock of The Fajardo Development Company, a Connecticut corporation, which taxes were paid under protest. The ground of protest and the theory of the action were, that inasmuch as The Fajardo Sugar Company is a New York Corporation and The Fajardo Development Company is a Connecticut corporation, and the said stock being admittedly (R. 38) held by The Fajardo Sugar Company in the City of New York, consequently the said shares of the capital stock of The Fajardo Development Company cannot be considered capital of The Fajardo Sugar Company employed in the transaction of its business in Porto Rico; that the assessment in question was, therefore, illegal and beyond the taxing jurisdiction of the Government of Porto Rico.

The facts and history of the case (Pleadings, R. 1-22; Stipulated Facts, R. 36-39) are as follows:

The Fajardo Sugar Company is a foreign corporation organized under the laws of the State of New York, and duly authorized to do business in Porto Rico. The business it does in Porto Rico is that of growing and grinding sugar cane at its mill in the City of Fajardo, managed by its resident director, Mr. Jorge Bird y Arias. Its principal office is in the City of New York, where all meetings of its Board of Directors are held, and where the entire policy and management of the corporation is conducted. The Fajardo Sugar Company owns 5,865 shares of the capital stock of The Fajardo Development Company, another foreign corporation, organized under the laws of the State of Connecticut, and duly authorized to do business in Porto Rico. The business The Fajardo Development Company does in Porto Rico is that of operating a railroad as a common carrier of freight and passengers. The certificates representing the said 5,865 shares of the capital stock of the Fajardo Development Company have been held ever since they were issued, by the Fajardo Sugar Company in the City of New York.

The local taxes for the fiscal year 1911-12 assessed against the Fajardo Sugar Company by the Treasurer of Porto Rico included an item of \$586,500 representing the par value of the said shares of the capital stock of The Fajardo Development Company, on the theory that these shares were part of the capital of the Fajardo Sugar Company employed in the transaction of its business in Porto Rico. This assessment is claimed to have been made under Section 320 of the Political Code of Porto Rico (1902) providing, in part, as follows:

SECTION 320. The assessment of every corporation, joint stock, and limited-liability company not incorporated in Porto Rico, but engaged in the transaction of business therein, other than banks, banking institutions having a share capital, shall be made in the manner provided by this title for the assessment of the property of institutions, corporations, and companies incorporated under the laws of Porto Rico: Provided, however, that in the determination of the actual present value of the capital of such corporation only such part of the capital of such corporations shall be considered and assessed as is employed in the transaction of business in Porto Rico, but the amount of such capital shall in no case be less than the value of the real and personal property of such corporation or company situated in Porto Rico, including in such personal property all franchises or concessions granted said corporation or company under the laws of Porto Rico. * * *

The Fajardo Development Company was also assessed for the said fiscal year 1911-1912 on its capital employed in Porto Rico, under said Section 320, which assessment has been unconditionally paid by it.

From that part of the assessment for taxes which included the said 5,865 shares of the capital stock of the Fajardo Development Company, held by the Fajardo Sugar Company in the City of New York as aforesaid, the

Fajardo Sugar Company appealed to the Permanent Board of Equalization and Review, on the ground that the said shares of stock had their *situs* beyond the jurisdiction of Porto Rico and were therefore not subject to taxation under said Section 320, not being capital of the Fajardo Sugar Company, employed in the transaction of its business in Porto Rico. The said Board made *inter alia* the following finding:

“(1) That the amount in question is capital actually invested in Porto Rico and is employed by the Fajardo Sugar Company in the transaction of its business in the Island.”

This tax in the sum of \$7,038, was then paid in full, under protest, by The Fajardo Sugar Company, as provided by law and this action was instituted within thirty days after such payment, pursuant to Act No. 35, approved March 9th, 1911, providing for the payment of taxes under protest, establishing procedure for the recovery thereof, and for other purposes, Laws of Porto Rico, 1911, page 124, which reads as follows:

SECTION 1. That in all cases in which an officer charged by law with the collection of revenue due the Government of Porto Rico, shall institute any proceeding or take any steps for the collection of the same, alleged or claimed by such officer to be due from any person, the party against whom the proceeding or step is taken shall, if he conceives the same to be unjust or illegal, or against any statute, pay the same under protest.

SEC. 2. Be it further enacted, that upon his making such payment, the officer or collector shall pay such revenue into the treasury of Porto Rico, giving notice at the time of the payment to the Treasurer that the same is paid under protest.

SEC. 3. Be it further enacted, that the party paying said revenue under protest, may, at any time within thirty days after making said pay-

ment, and no longer thereafter, sue the said Treasurer for said sum, for the recovery thereof, in the court having competent jurisdiction thereto; and if it be determined that the same was wrongfully collected, as not being due from said party to the Government for any reason going to the merits of the same, the court trying the case may certify of record that the same was wrongfully paid and ought to be refunded. Thereupon the Treasurer shall repay the sum, which payment shall be made in preference to other claims on the Treasury. Either party to said suit shall have the right of appeal to the Supreme Court.

SEC. 4. Be it further enacted that there shall be no other remedy in any case of the collection of revenue or attempt to collect revenue illegally.

SEC. 5. Be it further enacted that no writ for the prevention of the collection of any revenue claimed, or to hinder and delay the collection of the same, shall in any wise issue; either supersedeas, prohibition, or any other writ or process whatever; but in all cases in which for any reason any person shall claim that the tax so collected was wrongfully or illegally collected, the remedy for said party shall be as above provided, and none other.

The Fajardo Sugar Company brought this suit for the recovery of said tax, pursuant to the above statute, against Samuel D. Gromer, Treasurer of Porto Rico, in the District Court of the United States for the District of Porto Rico. Its complaint was filed September 12, 1911 (R. 1). On September 21, 1911, Samuel D. Gromer, as Treasurer of Porto Rico, appeared in this action by Foster V. Brown, Attorney General of Porto Rico, and answered the complaint at length on the merits (R. 3). On October 3, 1911, the said Attorney General stipulated time for trial and a waiver of trial by jury (R. 7). On February 5, 1912, The Fajardo Sugar Company filed an Amended Complaint (R. 9), pursuant to Order of Court

(R. 7) and a Supplemental Complaint (R. 11) pursuant to Order of Court (R. 8). On February 19, 1912, the said Treasurer of Porto Rico by the said Attorney General of Porto Rico, answered the Amended Complaint on the merits (R. 16) and likewise answered the Supplemental Complaint on the merits (R. 12). It was not until May 29, 1912, eight months after the complaint was filed, that either the Treasurer or the Attorney General of Porto Rico raised any question as to the jurisdiction of the District Court of the United States for Porto Rico to entertain this action; and this objection was then for the first time advanced by a new Attorney General, Mr. Wolcott H. Pitkin, Jr., who moved to dismiss the complaint on the ground that the District Court of the United States for the District of Porto Rico had no jurisdiction of the action (R. 19). The new Attorney General then stipulated (R. 19) for an adjournment of the trial to November, 1912, and the present Plaintiff in Error, Allan H. Richardson as Treasurer of Porto Rico was substituted as party defendant in place of Samuel D. Gromer, as Treasurer of Porto, against whom this action was originally instituted, said Samuel D. Gromer having resigned and said Allan H. Richardson being his successor in office.

On August 6, 1912, his Honor, Judge Paul Charlton, Judge of the District Court of the United States for Porto Rico, after mature deliberation denied the said motion to dismiss the complaint (Bill of Exceptions, R. 35; Journal Entry, R. 20). The Attorney General, after allowing eight months more to elapse, then renewed his motion on April 10, 1913, before another Judge, His Honor, Judge Peter J. Hamilton, Judge of said Court (Bill of Exceptions, R. 35; R. 20). The Court after mature deliberation, on June 26, 1913, denied this second motion (Bill of Exceptions, R. 36; R. 21), Judge Hamilton writing a lengthy opinion (R. 22-26).

The action was then tried on July 6, 1914, before Judge

Peter J. Hamilton without a jury, on an agr. a statement of facts (R. 36-39) and Judgment was entered in favor of The Fajardo Sugar Company against Allan H. Richardson, as Treasurer of Porto Rico in the said sum of \$7,038. (Judgment, R. 27). The Attorney General again moved to dismiss the Complaint at the close of the proceedings on the trial which motion was again denied (R. 28-29) and the judgment in question was then brought before this Court on writ of error (R. 41). No certificate, in reference to the question raised concerning the jurisdiction of the District Court of the United States for the District of Porto Rico, was ever obtained by the Plaintiff in Error in accordance with sections 238 and 244 of the Judicial Code.

The following are, in essence, the

Assignment of Errors (R. 30).

1. The Court erred in entertaining jurisdiction of this suit; and
2. The Court erred in rendering judgment for the Sugar Company.

Argument.

Our argument, in outline, is as follows:

POINT I. The Judgment should be affirmed on the merits.

- A. The tax in question is a tax on property and not a license or franchise tax.
- B. The shares of stock of The Fajardo Development Company upon which the government of Porto Rico has attempted to impose this tax are situated in a foreign state and are, there-

fore, without the jurisdiction of Porto Rico, and no tax can be levied upon the same.

- (1) That the property in question, namely the shares of the capital stock of the Connecticut corporation, are a well recognized form of personal property entirely distinct and separate from the property of the corporation itself.
- (2) That the *situs* of this personal property is either in the state of the domicile of the owner, in this case in the State of New York, the domicile of The Fajardo Sugar Company, or in the state of the domicile of the corporation, in this case the State of Connecticut.
- (3) That a foreign corporation for purposes of taxation or otherwise has not and cannot be presumed to have any other domicile than that of the state of its creation.
- (4) That the *situs* of the property in question being without the jurisdiction of Porto Rico, the Government of Porto Rico is without power either to assess the same or levy a tax thereon.
- (5) That the Government of Porto Rico has intended to do no such thing. That by law it assumes only to levy a tax upon such capital of foreign corporations as is employed within the Island of Porto Rico thus having its *situs* within its jurisdiction.

- C. The stock in question cannot be taxed because no equivalent is given by the government of Porto Rico in return for such taxation.
- D. The taxation of the stock in question, amounting as it does to the taxation of property beyond the jurisdiction of Porto Rico, is unconstitutional as the taking of property without due process of law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.
- E. Even considering that Section 320 of the Political Code imposes a license or franchise tax as distinguished from a property tax, nevertheless such tax would not include the stock of The Fajardo Development Company held by The Fajardo Sugar Company.

Analysis of the Plaintiff in Error's argument on the merits.

In Conclusion on Point I.

POINT II. The Court below had jurisdiction both of the defendant and of the action.

- A. Preliminarily—
 - (1) Is the question of jurisdiction of the District Court properly before the United States Supreme Court on writ of error?
 - (2) The opinion below.
- B. This suit is not against Porto Rico.
- C. Assuming this suit is against Porto Rico, nevertheless Porto Rico has by statute consented to be sued in the Federal Court.

- (1) Porto Rico's consent to be sued "in the court having competent jurisdiction" includes the Federal Court; and the statute is void of any provision which expressly or by necessary, or even reasonable implication limits such consent to the Insular courts.
- (2) The certification provided for by the statute that the tax "was wrongfully paid and ought to be refunded" amounts to a judgment by the Court.
- (3) The statute should be liberally construed so as to include in a proper case the jurisdiction of the Federal Court, unless a contrary intention clearly appears by necessary implication.

D. Assuming that the statutory consent of Porto Rico to be sued was impliedly limited to suits brought in the Insular courts, the various appearances and answers to the merits of the Attorney General and the Treasurer of Porto Rico and their failure to object to the jurisdiction of the Federal Court for over eight months constituted a waiver of that implied limitation.

In Conclusion on Point II.

Final Conclusion.

POINT I.

The judgment should be affirmed on the merits.*

The Fajardo Sugar Company is a New York Corporation, doing business in Porto Rico. It owns 5,865 shares of the capital stock of The Fajardo Development Company. The Fajardo Development Company is a Connecticut corporation, doing business in Porto Rico. The stock in question has always been held by The Fajardo Sugar Company at its offices in the City of New York. The statute (Section 320, Political Code of Porto Rico—1902) governing the taxation of foreign corporations and pursuant to the provisions of which the Treasurer of Porto Rico attempted to tax this stock, expressly provided that "only such part of the capital of such corporations shall be considered and assessed as is employed in the transaction of business in Porto Rico". And it is our fundamental contention, which we deem incontrovertible, that these shares of the capital stock of a Connecticut corporation held in the State of New York by a New York corporation cannot under any permissible construction of the statute in question be considered as capital of that New York corporation employed in the transaction of its business in Porto Rico. We believe our position in this

*We thus consider the merits of the judgment first, leaving the jurisdictional question raised by Plaintiff in Error for discussion under Point II hereafter, thus reversing the method adopted by counsel for Plaintiff in Error, because we believe the merits to be squarely before this Court upon the writ of error; whereas the Court may decline to review the jurisdiction of the Court below as not being properly before it on writ of error alone, without the certificate required by Sections 238 and 244 of the Judicial Code. We, however, call the Court's attention to the stipulation entered into by counsel, waiving objections to procedure (R. 34), and being bound thereby, do not now, nor will we, urge the lack of such certificate as any defect in the case of the plaintiff-in-error.

matter and the judgment of the Court below are unsatisfactory, for the reasons following.

A. The tax in question is a tax on property and not a license or franchise tax.

The power of the state to levy taxes is well summed up by Chief Justice Andrews in *People ex rel. P. R. R. Co. v. Wemple*, 138 N. Y. at p. 9:

"The state power of taxation extends in general to all property, real or personal, having an actual *situs* within the state, irrespective of the residence of the owner. The state may not only tax property within its limits, but the business and occupation of its citizens, and the franchise of domestic corporations; and when it permits foreign corporations to carry on business in the state, it may ordinarily subject the privilege to such tax as may seem expedient. In short, the power of state taxation is coextensive with the subjects of taxation, and the state may define the subjects, provided only that the property privilege, or rights upon which the tax is imposed, is within the jurisdiction."

Thus the subjects of taxation may be broadly defined as persons, property, privileges or rights within the jurisdiction of the taxing power.

In the taxation of foreign corporations, the subject of taxation cannot be the corporation itself as it cannot come within the jurisdiction of the foreign state, nor has its franchise any *situs* outside of the state which created it.

St. Louis v. Ferry Co., 11 Wall. at p. 429.

People &c. P. R. Co. v. Wemple, 138 N. Y. 1.

Therefore, property and privilege are the only subjects of taxation applicable by the state to a foreign corporation. Accordingly all states have taxed corporations on one or both of these subjects; first, by levying a tax upon

the *property* of the foreign corporation within the jurisdiction of the state and enjoying the protection of its laws, as its proportionate contribution to the burden of government in return for that protection; and second, by levying a *license* tax, not assessed against or imposed upon property, but exacted of the foreign corporation for the privilege of doing business within the state in its corporate capacity. Since a state can absolutely exclude any foreign corporation, it follows that it may impose such license fee as it may deem fit, measured by whatever standard seems expedient, but in equity and justice since this tax is levied on the privilege of doing business, it is usually measured by the volume of business done.

It is important, therefore, to determine the nature of the tax in question. If it is a tax upon property, it is necessary that the property so taxed should have its *situs* within the Island of Porto Rico, and subject to the jurisdiction of its courts. If it is a tax upon the privilege of doing business within the Island of Porto Rico, it is necessary that it should be within the measure of that tax as laid down in the statute. We believe that we can demonstrate to this court that the following propositions are so clear as to admit of no doubt;

1st; That the tax is against property;
2nd; That the property is without the jurisdiction of Porto Rico and has no *situs* therein;

3rd; That even if it were regarded as a privilege tax, the measure of that tax by the statute would be the capital employed in business in Porto Rico and that by no construction can the investment by a foreign corporation in the stock of another foreign corporation be regarded as the employment of its capital within the jurisdiction of Porto Rico, and hence, viewed either as property or privilege taxes, the levy and imposition of the same is unwarranted and illegal.

The laws relative to the taxation of individuals and corporations, domestic and foreign, are all embraced within Sections 285 to 355 inclusive of the Political Code of Porto Rico. These sections together form a complete and comprehensive system of *property taxation*, embracing within their provisions the real and personal property of resident and non-resident individuals and of domestic and foreign corporations. They impose no burdens whatsoever on the business of foreign corporations transacted in Porto Rico; they contemplate only the assessment and levy of taxes upon the property of such corporations in Porto Rico. The only *license or franchise* tax or tax on the privilege of doing business in Porto Rico is found in Section 353, paragraphs 2, 3 and 4, which provide for an annual tax of \$25. to be paid by all foreign corporations as a condition precedent to their doing business in Porto Rico, during the following year, and in Section 355 which imposes a license tax upon surety, insurance and building loan companies; but with these exceptions, the taxation of foreign corporations, exactly as in the case of individuals, is based upon property within the island. The title, the language employed, the method of assessment and the inter-relation of the sections concerning taxation of foreign corporations with those concerning taxation of domestic corporations and the individual, all reveal the settled purposes of the Legislature to make *property* the sole basis of taxation of corporations, as well as of individuals. Thus the title of this act is "Assessment of Property".

Section 285 provides for a tax "upon the value of all real and personal property in Porto Rico and of all personal property of persons residing in Porto Rico".

Section 286 provides that the Treasurer shall make a revision of the "Assessment of Property" and shall "assess all property subject to taxation".

Section 287 contains provisions for the establishment

of certain offices for the purpose of directing the work of the "Assessment of Property".

Section 288 provides for certain districts for the "assessment * * * of property for purposes of taxation".

Section 289 relates to the preparation of schedules, etc., for the "assessment of all kinds of property".

Section 290 says that "all property not expressly exempted from taxation shall be assessed and taxed".

The terms "Assessment of Property" or "Taxation of Property" or "Property" thereafter appear repeatedly and in practically every one of the remaining sixty-five sections; thus establishing beyond all question the fact that this law is and was intended to be a tax upon property and not a privilege tax.

Indeed the only instance where a privilege tax is imposed upon a corporation (outside of the annual tax of \$25.00) is to be found in Section 355, which says:

"Every surety, insurance or building and loan company not incorporated under the laws of Porto Rico, but doing business therein shall pay, as a franchise tax, in addition to the regular insular and other tax upon their real and personal property, and such special stamp tax as are hereafter provided, an annual tax of 3% upon the gross amount of all premiums or dues collected in Porto Rico, etc."

Thus showing conclusively that all other foreign corporations, except surety, insurance or building and loan corporations, are to be subjected only to the "regular insular and other taxes upon their real and personal property".

That property is to be the basis of any and all taxes on foreign corporations is evident from the most casual inspection of sections 316, 317 and 320. Section 320 says that the assessment of foreign corporations shall be "in the manner provided by this title for the *assessment*

*of the property of institutions, corporations and companies incorporated under the laws of Porto Rico" and the Sections providing for the taxation of corporations incorporated under the laws of Porto Rico unquestionably provide for a property tax; thus Section 316 concerning the taxation of real property of both domestic and foreign corporations provides that "the real property * * * shall be assessed in the assessment district in which said real property is situated"; while Section 317 regarding the taxation of personal property of domestic corporations provides that "the personal property shall be assessed * * * in the manner provided by this section". And the Section goes on to state that the value of the capital as ascertained in the manner therein provided, less the value of the real property as ascertained in accordance with the provisions of Section 316 "shall be deemed to represent the personal property of such corporations for purposes of taxation". In other words, the real property of foreign corporations is to be taxed as in Section 316; the personal property of domestic corporations is to be taxed according to the method outlined in Section 317, which in brief says, that the total capital of the corporation less the value of its real property shall be deemed, for purposes of taxation, the value of its personal property. *The capital as such is not taxed.* The Section simply provides that "the personal property * * * shall be assessed" and the method of arriving at the value of that personal property is pointed out. So also in the case of foreign corporations, their personal property is to be assessed and the method of arriving at the value of that personal property is to be the same method as is employed in arriving at the value of the personal property of domestic corporations. Except that, as further provided in Section 320, "in the determination of the actual present value of the capital of such corporations, only such part*

of the capital of such corporations shall be considered and assessed as is employed in the transaction of business in Porto Rico". In a word, the system of taxation of foreign corporations adopted by the laws of Porto Rico is that system of property taxation so generally prevalent.

The taxation of foreign corporations in Porto Rico is based on their property within Porto Rico, the same as is the taxation of domestic corporations and individuals. But there is a very great difference between the taxation of the personality of domestic corporations and the taxation of the personality of foreign corporations. In the case of domestic corporations, the entire capital, less the value of the realty is to be deemed the value of the personality; whereas in the case of foreign corporations only such part of the capital of such corporations is to be deemed the value of the personality as is employed in the transaction of business in Porto Rico. This important distinction appears very clearly in Section 320 of the Political Code, where, after stating that the assessment of foreign corporations is to be made in the same manner as the assessment of the property of domestic corporations, the following important proviso is added:

"Provided, however, that in the determination of the actual present value of the capital of such corporations only such part of the capital of such corporation shall be considered and assessed as is employed in the transaction of business in Porto Rico."

We believe, therefore, that it is demonstrable beyond all shadow of doubt, that the tax in question, sought to be assessed to the Fajardo Sugar Company and levied against its capital as represented by the shares of stock of the Fajardo Development Company owned by it, is levied against *specific personal property* belonging to the Fajardo Sugar Company. It follows as day follows night,

that if this specific property is not within the jurisdiction of Porto Rico and not employed by the Fajardo Sugar Company in its business in Porto Rico, then it is not subject to taxation by the Government of Porto Rico.

B. The shares of stock of the Fajardo Development Company upon which the Government of Porto Rico has attempted to impose this tax are situated in a foreign state and are, therefore, without the jurisdiction of Porto Rico, and no tax can be levied upon the same.

The tax objected to, as we have shown above, is a tax assessed against property, and in this case the specified property is 5,865 shares of the capital stock of a Connecticut corporation owned by the Fajardo Sugar Company. The following propositions, we believe to be established by the overwhelming weight of judicial opinion:

- (1) That the property in question, namely, the shares of the capital stock of the Connecticut corporation, are a well recognized form of personal property entirely distinct and separate from the property of the corporation itself.
- (2) That the situs of this personal property is either in the state of the domicile of the owner; in this case in the State of New York, the domicile of the Fajardo Sugar Company, or in the state of the domicile of the corporation, in this case, the State of Connecticut.
- (3) That a foreign corporation for purposes of taxation or otherwise has not and cannot be presumed to have any other domicile than that of the state of its creation.
- (4) That the *situs* of the property in question being without the jurisdiction of Porto Rico, the Gov-

ernment of Porto Rico is without power either to assess the same or levy a tax thereon.

(5) That the Government of Porto Rico has intended to do no such thing. That by law it assumes only to levy a tax upon such capital of foreign corporations as is employed within the Island of Porto Rico, thus having its *situs* within its jurisdiction.

(1)

We do not take it that the proposition that the shares of capital stock owned by a stockholder are personal property and a form of property entirely separate and distinct from the assets of the corporation itself, will be questioned by the learned counsel for the plaintiff in error.

When a stockholder invests his money in the shares of stock of a corporation, these shares become his personal property. They endow him with certain valuable intangible rights; the right to share ratably in the dividends declared; the right to vote at the meetings of the company; and the right to participate in any ultimate net assets of the company upon its dissolution. These rights are the whole of his property. He does not own one acre of land; one railroad tie; one factory wheel or any other asset of the corporation whatsoever. These rights which he has and which are evidenced by the certificates of stock can only be protected by the courts of his domicile or the courts of the domicile of the corporation. They have no existence and are not enforceable in a foreign jurisdiction, even though the corporation may hold much or all of its assets therein. They are intangible personal rights following the domicile of the owner.

McKeen v. County of Northampton, 13 Wright (Pa.) 519.

Plympton v. Bigelow, 93 N. Y. 592.
United States v. American Bell Telephone Co.,
29 Fed. 17.
Danville Banking & Trust Co. v. Parks, 88
Ill. 170.
Judy v. Beckwith, 13 Iowa, 24.
People v. American Bell Telephone Co., 117 N.
Y. 241.
Delaware R. R. Tax, 18 Wall. 206 at p. 229.
People ex rel. Edison L. & P. Co. v. Kelsey,
101 A. D. 205.
*Commonwealth v. American Bell Telephone
Company*, 18 At. Rep. 122.

(2)

The tax which the learned counsel for the Plaintiff in Error seeks to justify is, as we have shown, a tax sought to be imposed on certain specific property, namely, 5,865 shares of the capital stock of a Connecticut corporation, which is the personal property of the Fajardo Sugar Company, a New York corporation. The actual physical certificates of stock representing and evidencing the intangible rights of the Fajardo Sugar Company are locked up in a safe deposit vault in New York City. There is no question as to the actual physical location of these shares (R. 38). The rights which they represent, the personal property of this New York corporation, by the unanimous decision of all courts, have their situs for the purpose of taxation either in the state of the domicile of the owner or in the state of the domicile of the corporation issuing the shares.

On one hand, under the theory that personal property always follows the domicile of the owner thereof and that the courts of the domicile of the owner have the right to administer it in the case of his death and that the laws of this owner's domicile control its distribution, and in some

measure at least, protect him in the enjoyment thereof, it is held that such shares are taxable at the domicile of the owner and to have their *situs* for such purpose of taxation there.

On the other hand, under the theory that this form of property has its existence within the jurisdiction which creates, enforces and gives validity to the rights in question, such shares are held to have their *situs* in the domicile of the corporation which has issued the shares. They are taxable in one or both of these places. But the cases will be searched in vain for any decision whatsoever which holds that the property in question has any *situs* in a foreign jurisdiction, which is neither the domicile of the corporation issuing the shares nor the domicile of the stockholder owning the same.

Plympton v. Bigelow, 93 N. Y. 592.

Matter of Jones, 144 N. Y. 6.

Boston Investing Co. v. City of Boston, 36 Central Law J. 356 (Note).

Bradley v. Bander, 36 Ohio St. 36.

Seward v. Rising Sun, 79 Ind. 351.

State v. Branin, 23 N. J. L. 484.

People ex rel. Hoyt v. Comms., 23 N. Y. 224.

People ex rel. Hoyt v. Smith, 88 N. Y. 576.

Hartland v. Church, 47 Me. 169.

Preston v. Boston, 12 Pick. (Mass.) 7.

Matter of Douglas, 48 Hun, 318.

Greenleaf v. Board of Review, 184 Ill. 226.

State v. Kidd, 125 Ala. 413.

As a matter of fact the property in question has no existence within the Island of Porto Rico. The essence or substance of the property is intangible personal rights, evidenced by the certificates of stock. These rights are created by the State of Connecticut, and have only an existence insofar as they are maintained and enforced by

the power of that state. Leaving aside all constitutional guarantees, it is evident that if the state creating these rights abrogated them, they would cease to exist, and the State of Connecticut has exclusive jurisdiction over them; her courts alone can enforce them. If the Fajardo Development Company declared a dividend to its other stockholders, excluding the Defendant in Error, to the courts of Connecticut alone must resort be had for the enforcement of its rights. If the Fajardo Development Company denied the right of The Fajardo Sugar Company to vote upon its shares, to the courts of Connecticut alone must resort be had for the protection of this right. For any dissolution of the corporation, resort must be had to the courts of Connecticut alone. The rights in question which constitute this property are unenforceable, and therefore, not existing, within the Island of Porto Rico.

Guilford v. Western Union Tel. Co., 59 Minn. 332.

Clark v. Mutual Reserve Ass. Soc., 43 L. R. A. 390.

These considerations have led the courts to say that the *situs* of this property is, properly speaking, within the jurisdiction of the state which has created it. Thus the Court says in *Nashville Street Railway Company v. Morrow*, 2 L. R. A. 853, at p. 860:

“The *situs* of such an anomalous kind of intangible property may very well be fixed, for purposes of taxation at the place where the corporation has its *situs*. Such a *situs* is more nearly in accord with the fact than any other, and the location is in accord with reason and the demands of justice.”

Certainly it is evident that any argument which endeavors to maintain that this property had any *situs* within the island of Porto Rico would not only be con-

trary to all the legal precedent but also untrue in point of fact.

(3)

We believe that we have demonstrated above that the *situs* of this property is either in the State of New York, the domicile of its owner, or in the State of Connecticut, the domicile of the corporation issuing the shares. The proposition that a foreign corporation for purposes of taxation or otherwise, has not and cannot be presumed to have any other domicile than that of the state of its creation is too well settled to admit of any dispute.

Insurance Company v. Francis, 11 Wall. 210.

St. Louis v. Ferry Company, 11 Wall. 423.

Merrick v. Van Santvoord, 34 N. Y. 208.

Boston Investing Co. v. City of Boston, 36 Central Law J. 357.

International Life Ass. Soc. v. Commr's, 28 Barb. 318.

Steamship Company v. Commissioner of Taxes, 5 Hun, 200.

It is, therefore, evident that neither the Fajardo Sugar Company nor the Fajardo Development Company have any *situs* or domicile except in the states of their creation, the State of New York and the State of Connecticut, respectively, and if the property in question is located in the domicile of the owner, it is located in the State of New York, and if it is located in the domicile of the corporation creating it, it is located in the State of Connecticut. By no construction can it be held to be located in the Island of Porto Rico.

(4)

The proposition that the Government of Porto Rico is powerless to assess or tax property not within its jurisdic-

tion is so primary that we think the learned counsel for the Plaintiff in Error will admit its validity without dispute.

State Tax on Foreign-held Bonds, 82 U. S. 300.

McCulloch v. Maryland, 4 Wheat. 316.

Union Transit Co. v. Ky., 199 U. S. 194.

Board of Assessors v. Comptoir National, 191 U. S. 388.

Graham v. Township of St. Joseph, 67 Mich. 652.

People v. Equitable Trust Co., 96 N. Y. 393.

Commonwealth v. Standard Oil Co., 101 Pa. St. 119.

(5)

It seems perfectly clear that the Government of Porto Rico has not intended or contemplated levying any tax upon property not within its jurisdiction. Section 320 of the Political Code merely authorizes the imposition of a tax upon foreign corporations to the extent that they have brought their capital within the jurisdiction of Porto Rico and employed it in their business transacted in the Island of Porto Rico. It, therefore, contemplates merely a tax upon such property of foreign corporation as is employed in business within the island and has an actual *situs* therein, subject to the jurisdiction of her courts, and enjoying the protection of her laws. That the property upon which this tax is sought to be imposed is not within the jurisdiction of Porto Rico and is not employed by its owner in any business therein seems self-evident. We have shown above that the property in question is entirely distinct and separate from the property of the Fajardo Development Company. That property has been taxed and The Fajardo Development Company has paid all of the taxes demanded of it (R. 38). What is at-

tempted to be assessed and taxed here is something entirely separate and distinct, namely, the chose in action itself, the intangible personal rights. These we have shown to exist only in a foreign state and are not employed by the Fajardo Sugar Company in any of its business in Porto Rico. The Fajardo Sugar Company is by its charter forbidden to engage in the business of railroading; nor can it be assumed by reason of its ownership of stock in a railroad company to be engaged in that business, or to employ any of its capital in the business of railroading in Porto Rico. It has uniformly been held, even in cases where the tax in question is a franchise tax, and is measured by the amount of capital employed by the foreign corporation within the taxing state, that when a foreign corporation invests in the stock of another corporation doing business within the taxing state, it does not thereby employ its capital or do business within the taxing state, and is not liable to taxation on account of its investment in such stock.

United States v. American Bell Telephone Company, 29 Fed. 17.

People v. American Bell Telephone Co., 117 N. Y. 214.

Delaware Railroad Tax, 18 Wall. 206, at p. 229.

Commonwealth v. American Bell Telephone Co., 18 At. Rep. 122.

People ex rel. Edison L. & P. Co. v. Kelsey, 101 A. D. (N. Y.) 205.

It seems perfectly obvious that insofar as the Fajardo Sugar Company has invested its moneys in the stock of this Connecticut corporation, it is not doing business within the Island of Porto Rico. In truth and in fact so much of the capital of the Defendant in Error as is invested in this stock, if it can be said to be employed at

all, is employed at its domicile in the State of New York. It seems very clear that when a citizen of New York proceeds to buy a hundred shares of Union Pacific or a hundred shares of Chicago Gas, or whatever stock he may please, and buys and sells the same, that he is employing his capital in the State of New York, his domicile. He is not thereby employing his capital in Chicago or in San Francisco or wherever the corporations, whose shares he purchases and sells, may have their physical property. It has always been held that a tax upon the amount of capital employed in the transaction of business by a foreign corporation means capital invested and employed in the ordinary and regular business of the corporation; that an investment in securities is not an employment of capital at all within the meaning of the statute.

*People ex rel. N. Y. C. etc. R. R. Co. v.
Knight*, 173 N. Y. 255.

People ex rel. Hydraulic Co. v. Roberts, 30
A. D. N. Y. 180, aff'd 157 N. Y. 676.

The above cases and this whole question is more fully discussed hereafter under subdivision E of Point I of this brief. It is evident that both the physical shares of stock sought here to be taxed are actually present in New York and the intangible personal rights sought to be taxed are also beyond the jurisdiction of Porto Rico. By no just construction, therefore, can this property be taxed as capital employed within the Island of Porto Rico, having its *situs* within its jurisdiction. Capital or property representing capital, to be *employed* in the transaction of business in Porto Rico, within the meaning of the statute, must itself be within the territorial limits of Porto Rico. The cases are unanimous in holding that under such a statute, only so much of the capital as is measured by the property actually brought within the limits of the

taxing state by a foreign corporation in the transaction of its ordinary business can be considered in the assessment.

"When a tax is to be apportioned against a foreign corporation or partnership employing part of its capital within this commonwealth, only so much of the capital stock is to be taxed, as represents the actual value of the property within this jurisdiction."

Commonwealth v. Adams Express Co., 4 Pa. St. Dist. R. 139.

"To be employed within this State the property, whether money or goods, representing the capital, should be kept on hand in this state for use in the general business of the company, and it is its actual value only that it is subject to taxation."

People ex rel. Washington Mills Co. v. Roberts, 8 A. D. N. Y. 201.

People ex rel. Roehling's Sons Co. v. Wemple, 138 N. Y. 582.

People v. Equitable Trust Company, 96 N. Y. at p. 393.

Bradley v. Bradley, 36 O. St. 36.

Cooley on Taxation, 2nd Ed. p. 378.

Matter of Euston, 113 N. Y. 174, at p. 181.

People ex rel. S. Bank v. Coleman et al., 135 N. Y. 231.

McKeen v. County of Northampton, 49 Pa. St. 519.

R. R. Co. v. Porter, 17 Ind. 380.

Howe v. Starkweather, 17 Mass. 240.

Angell & Ames on Corporations, Sec. 560.

Potter on Corporations, Sec. 192.

Worth v. Commissioners of Ashe, 82 N. C. 420.

State Tax on Foreign-held Bonds, 15 Wall. 300.

State v. Kidd, 125 Ala. 413.

The Fajardo Sugar Company is engaged in the manufacture of sugar, and certainly it would be a most strange construction which would hold that that company has brought its shares of capital stock of a Connecticut railroad corporation into the Island of Porto Rico to employ these shares in the manufacture of sugar, irrespective of the admitted fact that the shares are in the City of New York.

The construction urged by the learned counsel for the plaintiff in error, subjecting as it does, property not within the island of Porto Rico, to taxation, cannot be adopted. That construction would place Porto Rico in the unique position of attempting to reach out and subject to its sovereign power of taxation, personal property situated in another state and justly liable to taxation in that other state, and thereby in some degree to shift the burden of its own government from the subjects of taxation which should logically bear them, upon other subjects beyond its jurisdiction, and therefore, not subject to its control for any purpose. As was said by Mr. Justice Brewer in *Cleveland etc. Railway v. Backus*, 154 U. S. 439:

"It is not to be assumed that a state contemplates the taxation of any property outside its territorial limits, or that its statutes are intended to operate otherwise than upon persons and property within the state. It is not necessary that every section of a tax act should in terms declare the scope of its territorial operation. Before any statute will be held to intend to reach outside property, the language expressing such intention must be clear."

C. The stock in question cannot be taxed because no equivalent is given by the Government of Porto Rico in return for such taxation.

In construing Section 320 of the Political Code there is a certain fundamental principle of taxation which is

to be always kept in mind. That principle, recognized by every state in the Union and by every civilized government, is this;—that the power of taxation, indispensable as it is to the existence of any government, is to be exercised only upon the assumption of an equivalent rendered to the taxpayer in the protection by the taxing power of his person or property or business. Protection and the payment of taxes are essentially correlative obligations and, unless plainly imperative, no construction of a Revenue Statute is to be entertained that will impose a tax without the probability, if not certainty, of a corresponding equivalent in the nature of protection.

"The taxing power rests upon the reciprocal duties of protection and support between the state and the citizen, and the exclusive sovereignty and jurisdiction of the state over the persons and property within its territory."

McKeen v. County of Northampton, 49 Pa. St. 519.

"Governments are organized for the protection of persons and property and the expenses of the protection may very properly be apportioned among the persons protected according to the value of their property protected."

Tappan v. Merchants National Bank, 19 Wall. 490.

"The principle of the present statute is that such corporations shall contribute according to the value of their capital 'employed within the state'. It lays a tax upon the privilege and measures the amount by the amount of property which is protected here."

Southern Cotton Oil Co. v. Wemple, 44 Fed. 24.

"It (N. Y. Franchise Tax Act) does not authorize taxation of foreign corporations based on the whole capital but only on the sums invested in

business in this state, for the obvious reason that this part of their property alone has the protection of our laws."

People ex rel. Bay State, etc., Co. v. McLean et al., 80 N. Y. 254.

"If the taxing power be in no position to render these services or otherwise to benefit the person or property taxed and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax."

Union Refrigerator Transit Co. v. Ky., 199 U. S. 194.

"It has already been seen that persons and property not within the territorial limits of a state cannot be taxed by it. In such a case the state affords no protection and there is nothing for which taxation can be an equivalent."

Cooley on Taxation, 2nd Ed., p. 55.

"Property is made the constitutional basis of taxation. This is not unreasonable. Governments are organized for the protection of persons and property and the expenses for the protection may very properly be apportioned among the persons protected according to the value of their property protected."

Tappan v. Merchants' National Bank, 86 U. S. 490 at 499.

International Life A. S. of L. v. Commons, 28 Barb. 318.

People ex rel. S. C. O. Co. v. Wemple, 131 N. Y. 64.

R. R. Co. v. Jackson, 7 Wall. 262.

State Tax on Foreign-held Bonds, 15 Wall. 360.

Delaware etc. R. R. Co. v. Penn., 198 U. S. 341.
State v. Kidd, 125 Ala. 413.

It being, therefore, indisputable that a tax upon property is not to be imposed except upon the theory of a corresponding equivalent in the nature of protection of the property taxed, it must necessarily follow that if no such protection can possibly be afforded by Porto Rico to the stock held by the Fajardo Sugar Company then no tax on that stock can be presumed to have been intended.

Under what conceivable theory can Porto Rico be said to afford any protection to this stock? Indeed it would appear self-evident that Porto Rico is powerless to protect the interest of a resident of New York in a corporation of Connecticut. How could one foreign corporation sue another foreign corporation in the courts of Porto Rico on a chose in action in Connecticut? Obviously the courts of Porto Rico would have no jurisdiction in such a case. If the Fajardo Development Company, a Connecticut corporation, should declare a dividend to all its stockholders except the Fajardo Sugar Company, the courts of Porto Rico would be impotent to compel the Fajardo Development Company to declare an equitable dividend. If the Fajardo Sugar Company should lose its certificates of stock in the Fajardo Development Company or if those certificates should be in some manner accidentally destroyed, the courts of Porto Rico would be powerless to order the Fajardo Development Company to issue to its New York stockholders, new certificates. Again, the courts of Porto Rico would be without jurisdiction to entertain a stockholder's action instituted by the Fajardo Sugar Company for the dissolution of the Fajardo Development Company.

Howell v. Chicago & N. R. Co., 51 Barb. 378.
N. State Copper & G. M. Co. v. Field, 64 Md. 151.
Madden v. Elec. L. Co., 181 Pa. St. 618.

Republican M. S. Mine v. Brown, 58 Fed. 645.
Wilkins v. Thorn, 60 Md. 253.
Petition of Rappleye, 43 A. D. (N. Y.) 84.
Guildford v. Western Union, 59 Minn. 332.
Clarke v. Mutual Reserve Fund, 43 L. R. A. 390.
Kansas & E. R. Co. v. Topeka, etc., Co., 135 Mass. 34.

If, therefore, the court in a foreign jurisdiction, even if much or all of the physical property of the corporation be situated therein, cannot and will not assume to say what the rights of its stockholders are or even whether the petitioner is a stockholder or has *any* rights as a stockholder, it is perfectly evident that the foreign court is totally powerless to protect this form of property in question, namely, a stockholder's rights as evidenced by the certificates and shares of stock which he may hold. As far as the foreign jurisdiction is concerned, such property does not exist at all. The Fajardo Development Company might erase the name of the Fajardo Sugar Company as a stockholder from its books; might declare its certificates of stock to be forfeited; might refuse to allow the Fajardo Sugar Company to vote on the same; might declare dividends to other persons and ignore any claims of the Fajardo Sugar Company for a proportionate share of its earnings; might dissolve the corporation and distribute the assets to strangers and not to the Fajardo Sugar Company, but the courts of Porto Rico would be absolutely powerless to prevent any of these things, or to protect the Fajardo Sugar Company in the just enjoyment of any of these rights. But these rights constitute the very *essence and substance* of the property sought to be taxed. It is, therefore, apparent beyond all question that the government of Porto Rico affords not a scintilla of protection in return for the tax which it is seeking to collect. No confusion should arise over

the fact that the courts of Porto Rico have power in a proper case to appoint a receiver of the assets of the Fajardo Development Company within its jurisdiction, because such a receiver can only be appointed to enable a citizen of Porto Rico to collect his just debt against this foreign company. If a foreign corporation does not pay its debts to the citizen of the state within which it is doing business, that state may through its proper officers sequester its property wherever it can lay its hands upon the same, for the satisfaction of the debts of its own citizens. But this very obviously is an entirely different thing than affording any protection to the rights of a stockholder in his property as a stockholder.

Dreyfuss & Co. v. Charles Scale & Co., 18
N. Y. A. D. 551.

It is well settled, and in a recent decision on this subject, this Court again said (*Union Transit Co. v. Ky.*, 199 U. S. 194) that where the state affords no equivalent in protection to property a tax upon that property cannot be justly and rightfully imposed. Such an attempted taxation is not taxation at all, but rather extortion.

Yet the interpretation of the tax laws of Porto Rico adopted by the learned counsel for the Plaintiff in Error would place the government of Porto Rico in the position of seizing property for which it had given no equivalent and practicing a sort of governmental hold-up which has no warrant in precedent nor justification in reason. We do not believe that such an interpretation of the law will recommended itself to the sense of justice of this Court.

The very fact that no equivalent can be given in return for the taxation of this stock, itself proves that the stock is without the territory and jurisdiction of Porto Rico. Porto Rico no doubt protects the property and business of the Fajardo Development Company, as far as it is conducted in Porto Rico, and has received the equivalent of

that protection in the tax levied upon the property and business of The Fajardo Development Company, which has been paid in full, but as has been pointed out heretofore that property and business are not the property and business of the Fajardo Sugar Company nor is it the property now sought to be taxed by the government.

Toll Bridge Co. v. Osborn, 9 Am. L. Reg. (N. S.) 73.

Georgia R. R. & Banking Co. v. Wright, 125 Ga. 589.

Commonwealth v. Fall Brook Co., 56 Pa. St. 488.

Commonwealth v. Lehigh Co., 162 Pa. St. 603.

Lockwood v. Town of Western, 61 Conn. 211.

Greenleaf v. Board of Review, 184 Ill. 226.

Union R. T. Co. v. Kentucky, 199 U. S. 194.

D. The taxation of the stock in question, amounting as it does to the taxation of property beyond the jurisdiction of Porto Rico, is unconstitutional, as the taking of property without due process of law within the prohibition of the Fourteenth Amendment to the Constitution of the United States.

These shares are capital or property situated in New York and in no sense employed in Porto Rico. To require the Fajardo Sugar Company under the name of taxation to pay an assessment on these shares would be an oppressive exaction made without statutory or constitutional warrant amounting to nothing less than the arbitrary seizure of private property without due process of law, within the prohibition of the Fourteenth Amendment. Within the meaning of this provision a corporation has been repeatedly and unanimously declared by the Courts to be a "person".

The Railroad Tax Cases, 13 Fed. 722.

In *Louisville and Jeffersonville Ferry Co. v. Kentucky*, 188 U. S. 385, a franchise granted by Indiana for a ferry across the Ohio River to the Kentucky shore was held to be property situated in Indiana and having its legal *situs* for purposes of taxation in Indiana and consequently the fact that such franchise was granted by Indiana to a Kentucky corporation which held a Kentucky franchise to ferry from the Kentucky shore did not bring the Indiana franchise within the jurisdiction of Kentucky for purposes of taxation. It was further held that the taxation of the Indiana franchise by Kentucky would be equivalent to the deprivation of property without due process of law in violation of the Fourteenth amendment.

It is of course obvious that the Indiana franchise in the case last cited was no more without the territory and jurisdiction of Kentucky for purposes of property taxation than the shares of stock of the Fajardo Development Company, held by the Fajardo Sugar Company at New York, are without the territory and jurisdiction of Porto Rico. Consequently the reasoning of the Ferry Company case and the conclusions therein determined have a direct application to the question herein at issue. If the taxation by Kentucky of the Indiana franchise amounted to the taking of property without due process of law, then the taxation by Porto Rico of this stock likewise amounts to the taking of property without due process of law. And if the taxation then attempted by Kentucky was unconstitutional so the taxation now attempted by Porto Rico is unconstitutional. The case is on all fours with the case at bar.

Furthermore, if Porto Rico could not directly tax this stock since it is without her jurisdiction, she cannot indirectly accomplish the same result by including it in the capital of the Fajardo Sugar Company employed in Porto Rico. This point was settled in the case of *Delaware L.*

etc. R. R. Co. v. Pa., 198 U. S. 341, where this Court thus disposed of it:

"We cannot see the distinction between a tax assessed upon property, *eo nomine*, or specifically when outside the state, and a tax assessed against the corporation upon the value of its capital stock to the extent of the value of such property and which stock represents to that extent that very property. If the property itself could not be specifically taxed because outside the jurisdiction of the state, how does the tax become legal by providing for assessing the tax on the value of the capital stock to the extent it represents that property and from which the stock obtains its increased value? Can the mere name of the tax alter its nature in such a case? If so, the way is found for taxing property wholly beyond the jurisdiction of the taxing power by calling it a tax on the value of capital stock or something else which represents that property. * * * The collection of a tax under such circumstances would amount to the taking of property without due process of law, and a citizen is protected from such taking by the Fourteenth Amendment."

E. Even considering that Section 320 of the Political Code imposes a license or franchise tax as distinguished from a property tax, nevertheless such tax would not include the stock of the Fajardo Development Company held by the Fajardo Sugar Company.

We are surprised that the learned counsel for the Plaintiff in Error should contend before this Court that the statute in question imposes a license tax. Such contention, however, is made at page 67 of his brief. That it is a property tax and not a license tax, we believe we have shown beyond cavil in subdivision A of Point I (*supra*), to which we refer in refutation of such a contention.

But even, for the sake of argument, admitting that Section 320 provides a license tax, and as such might legitimately have been so worded as to include the stock of foreign corporations held by another foreign corporation, nevertheless no such intent can be discovered in that section; the expression "capital * * * employed in the transaction of business in Porto Rico" as that expression appears in Section 320, is incapable of a construction which would include this stock.

The State of New York has enacted a franchise tax on the privilege of doing business within that state, as follows:

"Franchise tax on corporations. For the privilege of doing business or exercising its corporate franchises in this state every corporation, joint stock company or association, doing business in this state, shall pay to the state treasurer annually, in advance, an annual tax to be computed upon the basis of the amount of its capital stock employed during the preceding year within this state, and upon each dollar of such amount. The measure of the amount of capital stock employed in this state shall be such a portion of the issued capital stock as the gross assets employed in any business within this state bear to the gross assets wherever employed in business, etc."

Tax Law, Ch. 60, Section 182 of the Consolidated Laws of the State of New York.

Since the basis of the New York franchise tax is the amount of capital "employed" in New York just as the basis of the Porto Rican property tax is the amount of capital "employed" in Porto Rico, the New York decisions construing the New York statute should prove instructive in arriving at the meaning of the Porto Rican statute, considered for the moment as a franchise tax.

The decisions are unanimous to the effect that even when a domestic corporation holds stock in a foreign

corporation, this does not constitute the employment of capital in New York.

People ex rel. Edison L. Co. v. Campbell, 138 N. Y. 543.

People ex rel. N. Y. C., etc., R. R. Co. v. Knight, 173 N. Y. 255.

People ex rel. Hydraulic Co. v. Roberts, 30 A. D. 180, aff'd 157 N. Y. 676.

People ex rel. Trowbridge v. Comm. of Taxes, 4 Hun, 592, aff'd 62 N. Y. 630.

Apparently the only reported case where the claim was made that a foreign corporation by virtue of its ownership of stock in another foreign corporation was doing business and employing capital within the State of New York is *People ex rel. Chicago Junction, etc., Co. v. Roberts*, 154 N. Y. 1. Here a New Jersey corporation had invested its capital largely in stocks and bonds of an Illinois corporation, but maintained a leased office with furniture and had its officers and clerks within the State of New York, where it received and distributed the income derived from its investment in the Illinois corporation. The Court of Appeals repudiated the proposition that it was using any capital represented by these stocks and bonds of the foreign corporation in doing business within the State of New York. Andrews, *Ch. J.*, said:

"Its whole capital remains invested out of this state and it applies the income therefrom in the manner hereinbefore stated. It may be conceded that the relator in keeping an office in the City of New York where it received and disbursed its income derived from its investments in the Illinois corporation, depositing it in bank and drawing upon the deposit for the payment of its obligations, dividends to its shareholders and disbursements in

maintaining its office, was doing a part of its appropriate function as an investment company and that it was 'doing business within this State' which satisfied that condition of the statute. But the uncontested evidence establishes that it employed no part of its capital here and the second condition to the exercise of the taxing power under the act of 1885 did not exist."

Gray, *J.*, concurring, said:

"I think it would be straining the law beyond its capacity for construction to hold, where there has been an employment of its capital stock by a foreign corporation as in the present case, in a business investment without the state, that in the maintenance of an office within the state for purposes of convenience in the distribution of the money proceeding from its foreign investment, there had been an employment of capital here. Its capital is not here in any sense. The relator may be here itself for many corporate purposes; but it was not here for any purpose connected with an employment of its capital stock."

Following the reasoning of the last cited case, it can hardly be said that the Fajardo Sugar Company is within the territory of Porto Rico for any purpose connected with an employment of that part of its capital represented by its stock holdings in the Fajardo Development Company. It is engaged exclusively in the sugar manufacturing business, whereas the Fajardo Development Company is engaged in railroading. The Fajardo Sugar Company has not even an office in Porto Rico where it receives the income from its investment in the Fajardo Development Company. Its certificates of stock in the latter company are held in New York and its dividends are received in New York. Its capital is not in Porto Rico nor does it do anything whatsoever in Porto Rico even remotely connected with this investment. Under

what conceivable theory, principle, or maxim of law then could this investment be taxed as the employment of capital in Porto Rico?

People ex rel. U. S. Copper Co. v. Roberts, 156 N. Y. 585.

People ex rel. Pacific Mail S. S. Co. v. Comm. of Taxes, 5 Hun, 200.

People ex rel. Edison L. & P. Co. v. Kelsey, 101 A. D. 205.

People v. American Bell Tel. Co., 117 N. Y. 241.

People ex rel. Edison El. L. Co. v. Wemple, 148 N. Y. 690.

People vs. Trust Company, 96 N. Y. 381.

People vs. Mining Co., 105 N. Y. 76.

Suppose, for the sake of argument, the Fajardo Sugar Company were not doing business in Porto Rico, had not registered there as a foreign corporation, but had acquired these shares of the stock in the Fajardo Development Company, which is doing business there. Could the Fajardo Sugar Company be taxed on these shares? Certainly the proposition is self-evident that a foreign corporation not doing business within the Island of Porto Rico, nor in any way submitting to its jurisdiction, cannot be taxed upon the shares of stock of another foreign corporation; nor can it be seriously maintained that the fact that the second foreign corporation was doing business in the island made its shares of stock taxable by the Government of Porto Rico, in the hands of the holders thereof, wherever the said holders might be situated throughout the world. The fundamental and jurisdictional defects and the obvious illegality of such procedure are too apparent for argument. Now, let us suppose that the Fajardo Sugar Company commences to do business in Porto Rico. It buys land, erects a factory and installs

machinery, and manufactures sugar. The Fajardo Sugar Company is not in Porto Rico because its buildings and machinery are there. How then can it be maintained that these shares of stock, which very obviously were not present in Porto Rico formerly, have been constructively drawn within the jurisdiction of Porto Rico by the fact that it has erected a sugar plant, and how can it be maintained that it is employing in its business of manufacturing sugar these shares of stock? Would the business which it does in Porto Rico be added to or subtracted from whether it owned these shares of stock or not? Now, let us suppose again that the Fajardo Sugar Company ceases to do business in Porto Rico; that it sells its mill and its plant, and its capital used in that business is withdrawn; now, if these shares of the Fajardo Development Company were part of that capital, what must be done to withdraw them? Is it seriously maintained that the Fajardo Sugar Company must sell the stock of this Connecticut corporation in order to cease doing business in Porto Rico? Can it seriously be maintained that if it sold them to another foreign corporation that that corporation would have to take out a license to do business in Porto Rico before acquiring this stock of this Connecticut corporation? Yet this *reductio ad absurdum* is the necessary and inevitable result of the proposition that the shares of the stock in question are situated in Porto Rico and employed in business therein. The propositions are manifestly false. The stock is neither situated within Porto Rico nor is it employed in any business conducted therein.

Analysis of the Plaintiff-in-Error's Argument on the Merits.

The nature of the argument advanced in the plaintiff-in-error's brief in justifying a reversal of this judgment on the merits is nothing less than an admission by the plaintiff-in-error that the judgment is correct on the merits. Of a brief sixty-eight pages in length he devotes less than six pages to the merits; less than one-tenth of his entire brief is given to the question whether this tax was not unjustly and unlawfully exacted in violation of the constitutional rights of the defendant-in-error. And what is his argument? (Plaintiff in Error's Brief, pp. 63 to 68). To prove that "the shares of stock in question were a part of the capital of the Company 'employed in the transaction of business in Porto Rico,'" he urges that Porto Rico has the right to impose a tax on foreign corporations, based on the amount of capital employed in business within its territory. (We admit it.) He then cites authorities to prove that the power of taxation embraces persons, property and business within the jurisdiction. (We admit it.) He then insists that the State has power to tax foreign corporations for the privilege of exercising its corporate franchise within the taxing State (we admit it), even basing such tax on the portion of the capital employed within the State. (We admit it.) He then urges that in determining the proportion of capital so employed it is proper to consider the value of the corporation's tangible property within the State as compared with the value of its entire tangible property. (We admit it.) Throughout this entire immaterial discussion he assumes that the tax is a license tax, whereas the statute itself states that it is not, as we have shown heretofore (*Subdivision A, supra*). The case of *Maine vs. Grand Trunk Railroad Co.*, 142 U. S. 217, cited by him, is not in point. As stated in the open-

ing paragraph of the Opinion in that case, "the tax for the collection of which this action is brought is an excise tax upon the defendant corporation for the privilege of exercising its franchises within the State of Maine. It is so declared in the statute which imposes it." And the decision in that case was simply that a reference to the entire transportation receipts of a foreign corporation and to a percentage of the same in determining the amount of the excise tax, was not an interference with Interstate and Foreign Commerce.

Absolutely the only reason advanced by the plaintiff-in-error for considering these shares as capital employed in Porto Rico is stated at page 68 of his brief. This reason is so palpably the result of a confusion of thought, that we beg leave to quote it at length:

"It is clear that the portion of the capital stock invested in these shares is employed in business in Porto Rico inasmuch as the Development Company does no business elsewhere than in Porto Rico, its only business being the operation of railroads in Porto Rico principally for the transportation of persons and property incident to the business of the Sugar Company."

It is to be noted that not a solitary authority whatsoever is cited in support of that proposition. It of course carries with it its own refutation. The capital of the Development Company is not the capital of the Sugar Company. The entire capital of the Development Company may be employed in Porto Rico, and for that reason taxable to the Development Company (*which has paid such tax, contrary to the plaintiff-in-error's assertion at page 68 of his brief as to "no information on that point being disclosed in this suit". See Stipulated Facts, R. 38*), but the capital of the Sugar Company invested in the State of New York in shares of the capital stock of the Development Company is not employed in Porto

Rico for the reason stated. That portion of the capital of the Sugar Company so invested, was never within Porto Rico for any purpose. It is obviously false to assert that the investment of a New York corporation in the stock of a Connecticut corporation is the employment by the New York corporation of its capital in Porto Rico, merely because the Connecticut corporation happens to do business in that Island.

It is clear that a reversal of this judgment is not seriously sought on the merits but that the sole reliance of the plaintiff-in-error is on a technicality concerning the jurisdiction of the District Court (see Point II).

IN CONCLUSION ON POINT I, we respectfully submit that so far as equity, justice and law are concerned, there has rarely been a judgment brought before the Supreme Court of the United States for review which was more obviously correct on the merits. We respectfully submit that the judgment of the lower court, restoring to the Fajardo Sugar Company the money exacted from it under the guise of a tax erroneously, unjustly and illegally levied, should be affirmed, in all respects, on the merits.

POINT II.

The Court below had jurisdiction both of the defendant and of the action.

A. Preliminary.

(1) Is the question of the jurisdiction of the District Court properly before this Court on writ of error?

The learned counsel for the plaintiff-in-error argued this point at length. The attorneys for the parties in Porto Rico waived by stipulation exception to procedure in taking this case before this Court (R. 34-35). Doubtless the

counsel for the plaintiff-in-error feels that despite this stipulation the burden is on him to show that this question can be raised here without the certificate referred to in the sections of the Judicial Code cited, realizing that no stipulation of parties is binding on this Court with respect to its jurisdiction if this Court considers that the question is not properly before it.

United States v. Hamburg-American S. S. Co.,
239 U. S. 466.

We, however, feel bound by the stipulation, and therefore make no contention now that this question is not properly before the Court.

(2) The opinion below.

The plaintiff-in-error has consumed a considerable portion of his brief in a rather hypercritical analysis of the opinion of the Court below, on the theory that that opinion "proceeds upon such an obscure perception of principles and such confused reasoning" that the conclusion must necessarily be erroneous. Of course this does not follow at all. However illogical an opinion may be, if the conclusion is correct, the mental processes by which that conclusion was reached, are immaterial. *The conclusion reached was that the Federal District Court had jurisdiction of the action and it is with that conclusion alone that we are at this time concerned.* The main objection to the opinion is that "It cannot be said upon what the conclusion rests whether upon the theory that Porto Rico's immunity from suit was of a qualified kind, or that the suit was not one against Porto Rico, or that immunity was waived in this instance by the appearance and answer of the Treasurer and Attorney General, or that the Legislature itself had consented to the suit." We need only say that whether the conclusion was based on all or one or some of the grounds stated

is immaterial if the Court below correctly decided that the Federal Court had jurisdiction. We contend, however, that it is clear that the grounds on which the conclusion was based are: *First*, that the action is not against Porto Rico. *Second*, that Porto Rico has by statute consented to be sued in the Federal Court, and *Third*, that if the statutory consent were limited to the Insular Courts the appearance and answer of the Treasurer and Attorney General constituted a waiver of that limitation. And we will discuss these three propositions at length hereafter.

The plaintiff-in-error criticises the opinion as based on a wrong conception of Porto Rico's immunity from suit. But we submit that the opinion clearly recognizes the binding force of *People of Porto Rico v. Rosaly*, 227 U. S. 270, holding that the People of Porto Rico could not be sued without their consent. The opinion is then criticized as wrong on the question whether the suit was one against Porto Rico on the authority of *Smith v. Reeves*, 178 U. S. 436. The Court below, however, points out that this suit was *against the Treasurer* as provided in a statute which described the procedure in a suit designed to compel the Treasurer to carry out his duties under the statute; that the moneys in question were kept by the Treasurer as a separate fund, this finding being based not only on the statute but according to the settled practice of the Treasurer, and that any repayment directed by Court shall be "in preference to other claims on the Treasury" and then the Court said "It is not evident in what respect this is a suit against The People of Porto Rico." In other words, it appears that the money paid under protest under this statute is kept as a *special trust fund* to await the determination of the issue between the parties. And, therefore, this case is clearly differentiated from the Reeves case; and comes within the class of cases, mentioned by this Court in the Reeves

case where it was stated that suit may be maintained to recover specific moneys in the hands of a State Treasurer, although the Treasurer asserts that the right of possession is in the State, such a suit not being a suit against the State.

The plaintiff-in-error's final criticism of the opinion is that that opinion is inconsistent on the question of consent or waiver. The Court, however, pointed out that in the case at bar there is a Porto Rican statute expressly allowing suit against the Treasurer and even if that statute limited such suits to the Insular Courts, the appearance and answer to the merits of the Treasurer and Attorney General constituted a waiver of such limitation. We shall show hereafter that the fact that the question of waiver here arises in respect to a detail of *an express statute granting consent to be sued* differentiates the case at bar from the cases cited by the plaintiff-in-error where there had been *no statute at all* passed giving such consent, and presents a legal question based on a state of facts not heretofore passed on by this Court.

B. This suit is not against Porto Rico.

We fully recognize the fact that the Government of Porto Rico is so far endowed with the attribute of sovereignty that it enjoys immunity from suit without its consent. *Porto Rico vs. Rosaly*, 227 U. S. 270. But we contend that the suit at bar was not a suit against Porto Rico within the Rosaly decision. The Plaintiff-in>Error, however, earnestly insists that this suit, though in form against the Treasurer of Porto Rico, is in reality against the People of Porto Rico. This would be true if there were no statute on the subject in Porto Rico and suit had been brought against the Treasurer, or if the statute of Porto Rico were similar to the California statute, the

construction of which was in issue in *Smith vs. Reeves*, 178 U. S. 436.

As the Plaintiff-in>Error says, "the established rule is that whether the sovereignty is the actual defendant is to be determined by the nature of the case and not by mere reference to the nominal parties of record." The suit at Bar, however, was brought under a statute which nowhere states that Porto Rico itself is to be sued, and nowhere states that consent for such suit is thereby given; and which further provides that the taxes are to be paid *under protest*; that the officer or collector "shall pay such revenue into the Treasury of Porto Rico, giving notice at the time of the payment to the Treasurer that the same was paid under protest"; and that if the Court determines *in a suit against the Treasurer* that the tax ought to be refunded, that "*therupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury.*" And the finding of the Court below that such moneys are kept as a separate fund was based on these provisions of the statute and the settled practice of the Treasurer in keeping such moneys as a separate fund. The Court evidently had in mind the very essential fact that no further appropriation of these moneys was necessary on the part of the Legislative Assembly.

Construing this statute as a whole, which is the fundamental rule of all construction, it appears that this money is to be kept as a special trust fund, to await the determination of the issue between the Treasurer and the party complaining of the tax. As the Court below says (Opinion, R. 25):

"It directs the Treasurer to keep as a separate fund the money paid under protest, and after certificate from the proper court, 'the Treasurer shall repay the same, which payment shall be in preference to other claims on the Treasury.'"

It is thus apparent that this statute was not intended by the Legislative Assembly of Porto Rico as a statute granting the consent of Porto Rico to be sued, but rather was intended, as stated in its preamble, to regulate the procedure for the recovery of such taxes, establishing a method whereby the question arising between the Treasurer and the person taxed should be determined, the specific moneys in question being held meanwhile as a separate fund to be paid back by the Treasurer in preference to all other claims against him. Admittedly, after judgment, no further act of appropriation of these moneys by the Legislature is necessary. The moneys are already appropriated by the statute. The suit at bar, therefore, is to recover specific moneys, in the hands of the Treasurer, as the Court below says (R. 24) :

"In the case at bar there is no invalid statute in question. The suit is designed to compel the Treasurer of Porto Rico to carry out his duties under what may be assumed to be a valid statute. It is not evident in what respect this is a suit against The People of Porto Rico."

To prove his contention that this statute provided for a suit against Porto Rico and not merely against the Treasurer of Porto Rico, the Plaintiff-in-Error relies (Plaintiff-in-Error's brief, pages 29 to 32) squarely and solely on *Smith vs. Reeves*, 178 U. S. 436. But the case at Bar is not at all "on all-fours" with the Reeves case. That case was indeed a suit against the Treasurer of California to recover taxes, but it was brought under a statute totally dissimilar to the Porto Rican statute. The California statute, as appears from the opinion of the Court in the Reeves case, at page 437, expressly provided that such taxes be paid to the Treasurer just "*as other moneys are required to be paid into the Treasury.*" There was no provision in the California statute that this money was to be kept as a separate trust fund, as in the Porto

Rican statute; there was no provision that the tax should be paid under protest, as in the Porto Rican statute; there was no provision that the Collector should designate the moneys paid to the Treasurer as paid under protest, as in the Porto Rican statute; there was no provision that the tax paid should be refunded in preference to all other claims, as in the Porto Rican statute. In other words, in the Reeves case the money sued for was not in any sense "*specific moneys*," was not in any respect considered by the statute as constituting a trust fund, was not in any way given a preference. Whereas the Porto Rican statute clearly contemplates that this money paid under protest should be held as a specific trust fund, so designated by the Treasurer when received by him, separately earmarked, and repayable, without further appropriation, in preference to all other claims whatsoever.

The case at bar cannot be more clearly, in this respect, differentiated from the Reeves case than as stated by the Court itself in its opinion in the Reeves case, where it says:

"This case is unlike those in which we have held that a suit would lie by one person against another person to recover possession of specific property, although the latter claimed that he was in possession as an officer of the State and not otherwise. In such a case, the settled doctrine of this court is that the question of possession does not cease to be a judicial question—as between the parties actually before the court—because the defendant asserts or suggests that the right of possession is in the State of which he is an officer or agent. *Tindal vs. Wesley*, 167 U. S. 204, 221, and authorities there cited. In the present case the action *is not to recover specific moneys in the hands of the State Treasurer nor to compel him to perform a plain ministerial duty.*" (The italics are ours.)

The case at Bar is not at all similar to *Louisiana v. Jumel*, 107 U. S. 711. It was contended there that suit

would lie by mandamus against the Treasurer and other officers of Louisiana to compel them to pay over moneys alleged to be due to certain holders of bonds, which moneys were the product of a tax levied by virtue of a statute which provided that such money should be a special trust for the payment of the interest and principal of the said bonds. But the Court there points out,

"The taxes were collected by the Tax Collectors and paid to the State Treasurer, that is to say, into the State Treasury, just as other taxes were collected. The Treasurer is no more a trustee of these moneys than he is of all public moneys. * * * If there is any trust the State is the trustee, and unless the State can be sued the trustee cannot be enjoined."

But it is at once apparent, and this Court itself points out the distinction, that there is no similarity where the Treasurer is holding funds not as taxes rightfully and legally paid into the State Treasury, but as specific moneys which were wrongfully seized or received by him under void process. In one case there is no question as to the rightful title of the State to the moneys, whether as trustee or otherwise. In the other case the Treasurer unlawfully seizing private property is individually responsible for the same and may be unquestionably enjoined from such illegal seizure. This would not seriously be denied by counsel for the plaintiff-in-error, and if the Treasurer could be so enjoined from seizing property without due process of law it would follow inevitably that he could also be sued individually for the sums thus seized. In the Jumel case this Court point out, referring to the opinion of Chief Justice Marshall in *Osborne v. Bank*, 9 Wheat. 738:

"The officer stood in the place of the sheriff, who had levied an execution on goods and was sued to test his right to keep them, and the principle ap-

plied in the decision is thus stated in the head note of the report."

The intent of the statute in question that the specific money now sued for should be held as a separate fund and thereby appropriated by the Legislature as such, seems to be beyond question. It provides that where the Treasurer levies an unlawful tax and receives the amount thereof, the same shall be distinctly earmarked, and upon the determination of the legality of such levy shall be repaid in preference to all other claims.

That such provision is an appropriation of specific moneys for a specific purpose is clearly stated by Mr. Justice Field in his dissenting opinion in the Jumel case, which, upon that point, we take it, is not in conflict with the majority opinion and is soundly reasoned and correct law.

"There would seem to be an impression that to constitute a valid appropriation there must be some segregation of the amount appropriated from the general mass of money in the Treasury by which it is placed in packages, bags or boxes, separate from the rest and set one side. But nothing of the kind is done, nor is it required to take the amount appropriated from the control of the fiscal officers of the State for other purposes. *The appropriation is the legalization of the use of a designated amount in the Treasury for a specific object, and an inhibition of its use in any other way.* That is all. Henceforth, to meet the appropriation, the fiscal officers must retain the designated amount in the Treasury, but not necessarily separated in packages, bags or boxes, from other funds. Their duty is purely ministerial, to hold and to pay it when called for. Were this not so, there could be no appropriations of moneys before their collection, which it is the constant practice of legislative bodies to make in view of anticipated revenue. When the moneys are collected and passed into the

Treasury, the appropriation is complete. They are, in the eye of the law, dedicated to a specific purpose".

The Plaintiff-in-error in the case at bar, The Treasurer of Porto Rico, keeps such moneys in a separate fund entirely apart from other moneys in the Treasury, and no further appropriation by the Legislature is necessary. This is the vital consideration which must be borne in mind. In this connection we refer the Court to *Memphis R. R. Co. v. Tennessee*, 101 U. S. 337; *Baltzar v. N. C.*, 161 U. S. 240, and *So. Ala. R. R. Co. v. Alabama*, 101 U. S. 832 (hereafter discussed at length under Point II, C. (2)). The decisions in those cases are based on statutes providing the method of paying established claims, which statutes provided either, that the moneys found due by the Court could only be obtained by subsequent special legislative appropriation, or that the Court could merely recommend the claims to the Legislature for its favorable action. In all those cases some future appropriation was necessary. The distinction was clearly drawn between the case where some future appropriation by the Legislature was required and the case where the satisfaction of the judgment was a mere ministerial duty, on the part of the State's disbursing officer, to pay over moneys already appropriated. In the case at bar, the moneys in question have already been appropriated by the Legislature. Nothing else is to be done except for the Treasurer to perform the mere ministerial duty of paying over moneys already appropriated, which moneys are repayable in preference to all other claims.

Both *Smith vs. Reeves*, 178 U. S. 436, and *Louisiana vs. Jumel*, 107 U. S. 711, thus recognized the right of an individual to sue a State official in reference to specific moneys unlawfully received and appropriated for the purposes of such suit by the State, without being thrown out of court on the theory that he is thereby

suing the State against the prohibition of the 11th Amendment.

We submit, therefore, that the suit at Bar was not in any sense a suit against the People of Porto Rico but was on the contrary a suit against an official of Porto Rico within the permitted class of cases specified by this Court in the decisions cited above; because the Porto Rican statute in question, construed in its entirety, certainly sets aside and appropriates moneys thus paid under protest as a separate fund, repayable on order of the Court in preference to all other claims on the Treasury.

If such construction is correct, unquestionably the District Court had jurisdiction both of the defendant and of the action. Certainly the District Court is a "court of competent jurisdiction"; and the provision of the statute that "either party to said suit shall have the right to appeal to the Supreme Court" must be held to have been inserted simply to give the right of appeal to the Supreme Court of Porto Rico, in case the suit were brought in the insular courts, irrespective of the jurisdictional amount required by the Porto Rican Code of Civil Procedure in all other cases on appeal to that court. Otherwise, if that provision conferring the right of appeal were intended to oust the Federal Court of jurisdiction it would to that extent be inoperative and void. For it is well settled that wherever a general right is conferred, not contemplating a suit against the state itself, that right can be enforced in any Federal Court within the State having jurisdiction of the parties and cannot be withdrawn from the cognizance of such Federal Court by any provision of the State Statute that it shall only be enforced in a State Court.

Chicago & N. W. R. Co. v. Whitton, 13 Wall.

270.

Reagan v. Farmers Loan & T. Co., 154 U. S. 362.

Smyth v. Ames, 169 U. S. 466.

all approved in *Smith v. Reeves*, 178 U. S. 436.

In many cases the state legislatures provide special methods of procedure and name certain local courts in which such procedure may be had. But in all these cases the Federal Courts will take jurisdiction and apply the remedies prescribed, provided the other jurisdictional facts are present.

Delaware County v. Diebold Safe Co., 133 U. S. 473.

Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 240.

We submit, therefore, that the provision of the statute that "either party to said suit shall have the right of appeal to the Supreme Court" is not to be taken as an implication that the Federal Court is denied jurisdiction; in the first place, because that provision is easily reconcilable with an intent to give both the Federal and Insular Courts jurisdiction, the provision merely conferring a right of appeal that might otherwise not exist in the event that the action is brought in the insular court; in the second place, because no state can by any statutory provision oust the Federal Court of jurisdiction of an action to enforce a general right conferred by statute; and finally because, in view of the anomalous position that Porto Rico occupies in reference to the United States, "precaution against abuse" of the Porto Rican legislative power must be had, as stated in *Gromer v. Standard Dredging Co.*, 224 U. S. 362. This precaution must be taken because the status of Porto Rico has not yet by any means been clearly determined. The island is held by the United States without any obliga-

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tion of incorporating it into the Union; its officers are not elected by the people of Porto Rico; its legislative acts are repealable by Congress; its Federal Court has greater jurisdiction than the Federal District Courts in the United States. It would seem indeed to be more analogous to the "possessions" of the British Crown than to a State of the Union. Consequently if two constructions of the statute in question are equally possible, that construction should be adopted which will not deprive the Federal Court of jurisdiction.

C. Assuming this suit is against Porto Rico, nevertheless Porto Rico has by statute consented to be sued in the Federal Court.

Assuming this suit is against Porto Rico, the decision of this Court in *Porto Rico v. Rosaly*, 227 U. S. 270, becomes applicable. And our first premise must be that Porto Rico is so far endowed with the attributes of sovereignty as to be immune from suit without its consent. But the case at bar is of course clearly distinguished from, and not in the slightest respect opposed to, the Rosaly case because, whereas in the Rosaly case Porto Rico had not consented in any way to be sued, in the case at bar we have an express statute granting such consent. That statute is the Act approved March 9, 1911, which is set forth in our Statement of the Case, *supra*.

We admit not only that Porto Rico cannot be sued without its consent but that it may limit its consent to be sued to its own courts; that it may grant its consent to be sued in its own courts by private persons or by corporations, in respect of any cause of action against it and at the same time exclude the jurisdiction of the Federal Courts.

Smith v. Reeves, 178 U. S. 436.

Murray v. Wilson Distilling Co., 213 U. S. 151.

But we submit that there is nothing in the above statute which limits Porto Rico's consent to be sued for the recovery of taxes paid under protest to the Insular Courts. The suit, according to the statute, may be brought "in the court having competent jurisdiction" and certainly the Supreme Court of the United States will not hold that the District Court of the United States for the District of Porto Rico is not a court of competent jurisdiction. And we contend that the statute is devoid of any restriction of such suits to the Insular Courts, either in express terms or by necessary, or even reasonable, implication. As the Court below said (Opinion, R. 25) :

"Such a limitation, however, must clearly appear. This Court is not going to force construction of a matter in order to deprive itself of jurisdiction. In the Reeves case it was expressed that the suit should be brought in a State Court in Sacramento County, which necessarily excluded any other court. In the case at bar, however, the suit is to be brought in any court of competent jurisdiction, and this Court is not going to assert that it is not a court of competent jurisdiction."

- (1) Porto Rico's consent to be "sued in the court having competent jurisdiction" includes the Federal Court; and the statute is void of any provision which expressly or by necessary, or even reasonable, implication limits such consent to the Insular courts.

The objection to the jurisdiction of the Court below has been interposed, not on the theory that Porto Rico has not consented to be sued, but on the theory that it has not consented to be sued in the Federal Court. It is evident, therefore, that if this single objection were removed there would be no want of jurisdiction in the Court below. Therefore, if Porto Rico has consented to be sued in both the Insular and Federal Courts, this whole question must be resolved in favor of the defendant-in-

error, and the motion to dismiss was correctly denied by the lower court.

Porto Rico having consented to the institution of the suit and the suit being brought by a citizen of a foreign state, the defendant in error conceives that the Federal Court has "competent jurisdiction thereto."

The statute does not by express words or necessary implication exclude in a proper case the jurisdiction of the Federal Court in Porto Rico. Section 3 provides that "the party paying said revenue under protest, may, at any time within thirty days after making said payment, and not longer thereafter, sue the said Treasurer for said sum, for the recovery thereof in the court having competent jurisdiction thereto" and that "either party to said suit shall have the right of appeal to the Supreme Court." The statute does not name or designate any particular court in which the suit may be brought, but simply provides in general it can be brought in the court having competent jurisdiction. There is nothing in those provisions confining jurisdiction to the Insular Courts or intimating that where a citizen of a foreign state questioned the legality of an Insular assessment, he might not have the question judicially determined in the Federal Court. It does no violence to the statute to construe it as a consent to be sued in both the Insular and Federal Courts. On the contrary, it is entirely consistent with the letter of the statute and far more in accord with its spirit to construe these sections as conferring jurisdiction on both the local and Federal Courts, *suitors in the Insular courts being granted the additional privilege of an appeal to the Supreme Court of Porto Rico.* If the intent of the Legislative Assembly had been otherwise, it would naturally have stated that suit must be brought in the Insular courts. There are many local statutes prescribing remedies and specifically mentioning therein the Insular courts in which the action may be brought. In the absence of any

such express restriction it will not be presumed that the government of Porto Rico, having provided an opportunity for the recovery of illegal assessments, meant otherwise than that such opportunity should be as full and ample as possible. The sentence "either party to said suit shall have the right of appeal to the Supreme Court" should be construed to mean that in cases brought in the Insular courts appeal may be had to the Supreme Court. It would be absurd for the Legislature of Porto Rico to prescribe what cases should be appealed to the United States Supreme Court and, therefore, the statute is silent on that point. The Legislative Assembly first gave a general consent to be sued in any court of competent jurisdiction and, apparently as an afterthought, added a right of appeal to the Supreme Court of Porto Rico. This was necessary because, otherwise, in many cases brought in the Insular courts the amount involved would not be sufficient to confer jurisdiction for such appeal. This provision does not therefore, as is contended (Plaintiff in Error's brief, p. 41) necessarily limit the suit to the Insular Courts. It was merely inserted, in the event that suit were instituted in an Insular Court, to allow appeal to the Supreme Court of Porto Rico *irrespective of the amount involved* which would, without this clause, be a condition precedent to such appeal, as provided in the Porto Rico Code of Civil Procedure regulating appeals to the Supreme Court of Porto Rico. Certainly it was not the intention, after giving jurisdiction to both Insular and Federal Courts to immediately oust the Federal Court of the jurisdiction thus conferred, simply by inserting a provision allowing appeals from the Insular Court to the Supreme Court of Porto Rico in tax cases, irrespective of amount involved. The statute not only does not exclude the Federal Court from jurisdiction but is readily susceptible of the more equitable construction placed

upon it by the defendant in error in bringing the action in the Federal Court; *i. e.*, that in proper cases either the Federal or the Insular Courts would have "competent jurisdiction thereto" and that if the action were brought in the Insular Courts, either party could appeal to the Supreme Court of Porto Rico.

The learned counsel for the Plaintiff in error cites in support of his construction *Smith v. Reeves*, 178 U. S. 436. That case is readily distinguished from the case at bar. In the first place, the immunity from suit of a sovereign state was there involved, not the immunity of such an inferior political entity as The People of Porto Rico. In the second place, the California statute there in question was incapable of any other construction than that given it. The necessary implication was that suit had to be brought in the State Court. The statute (Section 3669, Political Code of California) allowed taxes to be recovered by suit if notice of the suit was given to the Comptroller. It further provided that "at the time the Treasurer demurs or answers, he may demand that the action be tried in the Supreme Court of the County of Sacramento". It regulated procedure in detail. It provided ten days time for service of a copy of the summons and complaint upon the Treasurer after filing of the complaint. It provided thirty days time for demurrer or answer by the Treasurer. It provided that "The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials and appeals are applicable to the proceedings herein provided for". It was held that these detailed provisions necessarily implied that California intended to limit its consent to be sued to suits brought in its own judicial tribunals.

The Court clearly propounded this, as follows:

"It is quite true that the state has consented that its Treasurer may be sued by any party who insists that taxes have been illegally exacted.

* * * But we think that it has not consented to be sued except in one of its own courts. This is not expressly declared in the statute, but such, we think, is its meaning. The requirement that the aggrieved taxpayer shall give notice of his suit to the Comptroller and the provision that the Treasurer may at the time he demurs or answers 'demand that the action be tried in the Superior Court of the County of Sacramento' indicate that the state contemplated proceedings to be instituted and carried to a conclusion only in its own judicial tribunals. If a Circuit Court of the United States can take cognizance of an action of this character, the right given to the Treasurer by the local statute to have the case tried in the Superior Court of Sacramento County, would be of no value; for, as the jurisdiction and authority of a Circuit Court of the United States depends upon the Constitutions and laws of the United States, it could not refuse to take cognizance of the case if rightfully commenced in it and to proceed to final decree, nor could it, merely in obedience to the laws of the state, transfer it to a State Court, upon the demand of the State Treasurer. A Federal Court can neither take nor surrender jurisdiction except pursuant to the Constitution and laws of the United States."

In the case at bar there is no provision in the statute requiring notice to the Treasurer or other official; there is no provision that suit must be brought in an Insular Court nor permitting the Treasurer to demand that the action be tried in any particular local court; there are no provisions regulating procedure as to pleadings, proofs, trials and appeals; and if this Court refuses to construe the Porto Rico statute as excluding federal jurisdiction, no such anomalous results are to be anticipated as were feared by the Court in the Reeves case. No rights or privileges regarding the trial or conduct of the action are conferred upon the Treasurer, Attorney General or other officer of Porto Rico which might be rendered

valueless by such refusal; and *there is nothing whatever in the statute which would prevent the Federal court, having once assumed jurisdiction, from carrying the case through to judgment.* The provisions of the Porto Rican statute that suit may be brought for recovery of taxes "in the court having competent jurisdiction thereto" and "either party to said suit shall have the right of appeal to the Supreme Court" are not at all analogous to the provisions in the Californian statute which operated to preclude the jurisdiction of the Federal Court in the Reeves case. Under the California statute the Federal Court would be ousted of its jurisdiction almost on the threshold of the case by the motion of the Treasurer for removal to the court prescribed, unless the statute were expressly disobeyed. On the contrary, as heretofore shown, complete jurisdiction is given to both Federal and Insular courts by the Porto Rican statute and where the suit has been brought in the Insular courts, the additional privilege of an appeal to the Supreme Court of Porto Rico is allowed, irrespective of the amount involved. Moreover, the lower Court in the Reeves case correctly and concisely stated the general rule applicable in such cases:

"I think it is a fair deduction from the authorities as from principle, that the right of suit against the Treasurer of the State being given, it may be brought in the Federal courts when other grounds of jurisdiction exist."

Reinhart v. McDonald, 76 Fed. 403.

This general rule was not questioned by the higher court but only the lower court's application of it to the statute at issue. Indeed, the Reeves case itself can be justly cited in support of the propositions that where a state has consented to be sued, it can be sued in its own courts, or, if other grounds of Federal jurisdiction appear, in the Federal courts, and that this will be the construction

placed upon the statute unless express words or necessary implication forbid. This is the rule followed by the Federal courts even in the sovereign states, which in their separate spheres are supreme as to all powers not surrendered to the central government or prohibited to the states by the Constitution of the United States and which possess the exclusive right of regulating their own internal affairs. Will not the Federal Court, therefore, be at least equally solicitous of its jurisdiction in the Island of Porto Rico, a new and unincorporated territory, of a suit for the recovery of taxes levied in violation of the Constitution of the United States?

The plaintiff in error, at page 43 of his brief, attempts to answer this argument, saying, "If the plaintiff can elect to bring his suit in the Federal court he can thereby deprive The People of Porto Rico of the clear right of appeal, expressly provided by the act, to the Supreme Court of Porto Rico." But we do not contend, and never have contended that the plaintiff "can elect" to bring his suit in the Federal Court. If he is a citizen of Porto Rico he must bring his suit in the Insular Court. If he is a citizen of one of the United States, he can bring his suit in the Federal Court. No "election" is given by the statute; nor could it be given, since Porto Rico could not confer jurisdiction upon the Federal Court where diversity of citizenship did not exist. Under the construction adopted by the defendant in error, no right of appeal is taken away from The People of Porto Rico. If the action is brought in the Insular Court appeal is permitted to the Supreme Court of Porto Rico, irrespective of amount involved. If the action is brought in the Federal Court, diverse citizenship existing, the appeal is to the United States Supreme Court, just as Porto Rico has appealed in the very case at bar. The fact that the right of appeal to the Supreme Court of Porto Rico is given in case the suit is brought in the Insular Court is not at all inconsistent

with an intention on the part of the Legislature that the expression "court of competent jurisdiction" should include the Federal Court in a proper case. If the construction of the plaintiff in error were adopted then Porto Rico has sought to take from the Federal Court all jurisdiction, even the well established right of injunction against the levying of a tax which is unconstitutional within the prohibition of the 14th Amendment.

(2) The certification provided for by the statute that the tax "was wrongfully paid and ought to be refunded" amounts to a judgment by the Court.

The point has been raised (Plaintiff-in-Error's Brief, p. 44) that even if the Legislature intended to consent to have this question litigated in the Federal Court, that intent would appear to fail of effect, because the certification provided for by the Act would seem to be beyond the judicial power of the United States, since "the certification does not seem to be a judgment enforceable as such". The learned counsel for the plaintiff-in-error says it is even doubtful if the remedy provided by the act is a judicial remedy at all. Such a doubt, however, does violence to the plain terms of the statute, which provides that the party paying under protest "may sue the said Treasurer for said sum, for the recovery thereof in the court having competent jurisdiction". The money paid under protest meanwhile is kept by the Treasurer as a separate fund and if the court "determines" that the same was wrongfully collected "the Court trying the case may certify of record that the same was wrongfully paid, and ought to be refunded", and "thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury".

Obviously, the expression "the Court may certify of record that the same was wrongfully paid, and ought to be refunded" is only another way of saying that "the

Court may enter judgment that the same was wrongfully paid, and ought to be refunded". What else is a judgment except a "certification of record?" The Court below pointed out that upon such determination by the Court it was the plain duty of the Treasurer, according to the express terms of the statute, to repay the money in preference to all other claims on the Treasury; and the Court below was eminently right in thereupon saying (R. 25) :

"This Court will not presume that the Treasurer will not do his duty, and will not now discuss the question of what would be the remedy in case he did so refuse. While the proceeding is a peculiar one, it is not clear that it is not a judgment to all intents and purposes."

The law provides that such certification shall be made after it has been "determined" by the Court that the tax was wrongfully collected. Such "determination" of rights is the very essence of a judgment. As was said by this Court at this present term,

"The duty of this court as of every judicial tribunal is limited to determining rights of persons or of property which are actually controverted in the particular case before it."

United States v. Hamburg-American S. S. Co.,
239 U. S. 466.

"A judgment is the decision of a controversy given by the court between parties who do not agree. *Ward v. Kenner* (Tenn.), 37 S. W. 707."

Words and Phrases, Vol. 4, page 3827.

It is difficult to see why such a judgment or certification so-called is not just as enforceable as any judgment against a sovereignty could be. The statute of 1911 says:

"And thereupon the Treasurer shall repay the same, which payment shall be made in preference to other claims on the Treasury."

Thus the Legislature has bound itself to abide by the Court's decision, call it certification, or judgment, or what you will, in as strong and express terms as possible. It has left no discretion with the Treasurer. It has preferred the claim above all others on the Treasury. It has reserved no subsequent action of approval or appropriation to itself. The words of the statute are in this respect at least beyond cavil.

Black in his title "Judgments," 23 Cyc. 669 (see also 1 Black on Judgments, section 43), says:

"In general the office of the judgment is fully performed when it declares and adjudicates the existence or non-existence of the liability sought to be established; it is not concerned with the means of authorizing the liability declared; although it adjudges that the one party 'have and recover' a certain sum from the other, it is not necessary that it should command the debtor to pay the money, or authorize or direct the issue of an execution, or that it should be served on any party to the cause after it is entered or filed."

"No judgment is final which does not determine the rights of the parties in the cause and preclude further inquiry as to their rights in the premises. But it is not essential if the judgment be final that it should establish all the rights existing between parties to the suit; all that is required is that it should determine the issues involved in the action; and the judgment is none the less final because some future orders of the Court may become necessary to carry it into effect."

The future order of the Court, in case one were needed, would be one simply directing the Treasurer to obey the law in regard to which, as has already been pointed out, he is left no discretion.

In fact, how could The People of Porto Rico go further in submitting to the mandates of the Court; a sovereign which can say whether or not it may be sued may also

say whether or not it will submit to the judgments of the Courts, and it is only logical that the judgment against such has moral force only.

If the contention of the plaintiff in error be true, then, in no case, may a suit against a state be maintained in a Federal court, because, even though its consent to be sued and to abide by the judgment is perfectly clear and unmistakable, there is no assurance that it will in fact abide by that judgment or have sufficient funds with which to meet it. What, then, can be done? The Court may issue execution. Could it sell property of the State, or would the execution be returned unsatisfied?

The learned counsel for plaintiff in error seems not to have read Mr. Chief Justice Waite's opinion in *Memphis R. R. Co. v. Tennessee*, 101 U. S. 337, cited by him in this connection, to its conclusion, for in the last paragraph we find:

"Neither do we find it necessary to determine what would be a complete judicial remedy against a state, nor whether, if such remedy had been given, the obligation of the contract entered into by the state when it was in existence would be impaired by taking it away."

In other words, the Supreme Court expressly refused to decide what opposing counsel would like to have had it decide, but limited itself to saying that, since the privilege given by the state was merely the adjudication of claims and therefore the judgment was unenforceable, the obligation of such contracts as the one involved were not impaired by the repeal of the privilege, and it is stated in the opinion that

"The only question now to be determined is whether or not that withdrawal impaired the obligation of the contract which the railroad company seeks to enforce."

It is submitted that this is very far wide of the point in support of which the counsel for plaintiff in error cites the Memphis case (*supra*).

In the above case, as well as in the other two cited by the counsel for the plaintiff-in-error, *i. e.*, *Baltzar v. N. C.*, 161 U. S. 240; *So. Ala. R. R. Co. v. Alabama*, 101 U. S. 832, it is evident that the decisions rested largely on the statute providing for the payment of the claims. In the Tennessee case, the statute provided that the money to pay any amount found due by the Court could only be obtained by special legislative appropriation; in the North Carolina case, the Court could only recommend the claims to the Legislature for its favorable action; and, in the Alabama case, although the comptroller was authorized to pay upon certificate of the clerk and Judge of the Court, he could not do so until after six months, and the constitution of the state provided in express terms that no money could be taken from the Treasury but in consequence of appropriation made by law.

And, on this point, the Court said in the North Carolina case, referring to the Alabama case, having just quoted from the opinion in the Tennessee case:

"Subsequently in the case of *So. and No. Alabama R. R. Company v. Alabama*, 101 U. S. 832, the same question was presented on a state of facts somewhat stronger in favor of the contention that there was a contract right than that which had been considered in the foregoing case (Tenn. case). There (in the Alabama case) the facts were that the statute of the state existing at the time the contract was made not only authorized a judgment to be rendered against the state, but provided (we quote from the opinion) 'that if judgment should be rendered against the state, it was the duty of the comptroller, on the certificate of the Clerk of the Court, together with that of the Judge who tried the cause, that the recovery was just, to issue his

warrant for the amount, but no certificate could issue until six months after the recovery of the judgment'."

It is easy to see from the argument in this case that in the mind of the Supreme Court much depended upon the question as to whether or not the satisfaction of the judgment depended on some future action or approval of the Legislature, or whether or not the satisfaction of such judgment became a mere ministerial duty on the part of the government's disbursing officer and was immediately payable.

In the case at Bar, no action by the Legislature is necessary, and all that remains is that the Treasurer follow the clear mandates of the Statute and repay the moneys illegally collected. No question can arise as to sufficiency of funds for this purpose, because the Legislature has given such a judgment priority over all other claims against the Treasury.

A judgment in any other form could not be more effective against a sovereignty. How the judgment is to be enforced if the Treasurer failed to perform his duty, whether by mandamus or otherwise, is academic and at present unimportant. We imagine this Court or the Court below would not find much difficulty in coercing, if necessary, the performance by the Treasurer of a plain ministerial duty under this statute.

It is submitted therefore that a judgment by the Court is authorized by the statute; a judgment which terminates the controversy; a judgment which commands the disbursing officer of the defendant to satisfy it, as required by statute.

(3) The statute should be liberally construed so as to include in a proper case the jurisdiction of the Federal Court, unless a contrary intention clearly appears by necessary implication.

In the absence of express restriction, such construction should be adopted as will render the statutory remedy as full and ample as possible. If the provision that "either party to said suit shall have the right of appeal to the Supreme Court" is capable of two interpretations; one, that it applies only in case the suit is brought in the Insular Court, the other that it impliedly confines suit to the Insular Court, both interpretations being equally possible, that construction should be followed which does not deprive the Federal Court of jurisdiction. An implied reservation should not be read into the general consent granted unless such reservation appears by necessary implication. No forced construction should be tolerated which would deprive citizens of the United States of the protection of the Federal Court in respect to their investments in Porto Rico. No intention on the part of the Legislative Assembly of Porto Rico to deprive them of such protection will at any rate be presumed. It must be borne in mind that the status of Porto Rico has not as yet by any means been fully determined by this Court. Although it cannot be sued without its consent (*Porto Rico v. Rosaly*, 227 U. S. 270), this Court recently held that such consent could be given without statutory permission (*People of Porto Rico vs. Ramos*, 232 U. S. 627). It has been held to be merely appurtenant to the United States as a "possession" and not a part of the United States within the revenue clauses of the Constitution (*Downes v. Bidwell*, 182 U. S. 244). The United States need never incorporate it into the Union; its officials, judicial and administrative, are not elected by the People of Porto Rico; its legislative acts are repealable by Congress; "precaution against abuse" by the Legislature must be taken (*Gromer v. Standard Dredging Co.*, 224 U. S. 362). While Porto Rico is thus in a process of evolution, this Court will not go out of its way to read into an express statute of Porto Rico, granting consent to be sued in the court of competent jurisdiction, an implied limitation

of such consent. The only provision that is suggested by plaintiff in error as limiting this general consent is the provision allowing appeal to the Supreme Court of Porto Rico, and as stated (Point II, C, 1, *supra*) this provision does not necessarily or by any reasonable construction limit the suit to the Insular Courts but on the contrary is readily susceptible of the more equitable construction that in case the suit is brought in the Insular Court, an appeal may be taken irrespective of amount. We submit, therefore, that Porto Rico, having admittedly granted its statutory consent to be sued, it will be presumed that there was no intention to restrict such suits to the Insular Courts unless the contrary clearly appears.

In *State v. Curran*, 12 Ark. 321, the Court, construing a statute providing, in accordance with the direction of the state constitution, for the institution and maintenance of suits against the state, said:

"It is insisted * * * that in ascertaining what the legislature did provide in this connection, a strict construction should prevail and that nothing should be intended in favor of the citizen's right to sue the state that is not within the express and explicit letter of the statute. * * * It cannot be supposed that the people in convention directing that the legislature should provide in what courts and in what manner suits may be commenced against the state, intended that those provisions should be any other than such as would advance this right in the citizen to 'apply to the courts of justice for the redress of grievances.' The spirit of the law then would rather demand a liberal than a strict construction. At any rate, we can perceive no valid reason, either intrinsic or extrinsic, why we should interpret these acts of the Legislature as we would a criminal statute that had created a new crime or misdemeanor, or a civil one that had taken from a citizen a common law right."

Similarly in the case of *Pike v. State*, 20 La. Ann. 547, where plaintiff sued to recover a large sum of money from the State under a Statute whereby the State consented to be sued, the statute was liberally construed, the Court remarking:

"The authorization to the plaintiff to institute this suit clearly contemplated a full and fair investigation of the claim set up by the plaintiff."

See

- *Chapman v. State*, 104 Cal. 690.
- Farish v. State*, 4 How. 170.
- Hygenbotham's Ex'x v. Commonwealth*, 25 Grat. (Va.) 627.
- Prewitt v. Ill. Life Ins. Co.*, 93 S. W. 633.
- Carter v. State*, 22 So. (La.) 400.

The general rule in this connection was succinctly stated in *Louisiana v. Jumel*, 107 U. S. 711, followed by *State v. Lazarus*, 5 Southern Rep. (La.) 289, as follows:

"When a state submits itself, without reservation to the jurisdiction of a court in a particular case, that jurisdiction may be used to give full effect to what the state has by its act of submission allowed to be done."

So, in the case at bar, Porto Rico having by statute submitted itself without reservation to suits at the hands of taxpayers in the courts having competent jurisdiction thereto, that statute will be construed to carry into full effect what Porto Rico has thus permitted, to wit, the judicial determination of tax disputes arising between itself and its taxpayers.

The inexpediency of the narrow view assumed towards this statute by the plaintiff in error becomes even more apparent when it is considered that the statute in question is a revenue statute. The constitutional requirement of "due process of law" of course applies to tax proceedings. If a revenue statute fails to provide an opportunity

for a taxpayer to be heard in opposition to the assessment of valuation of his property before his liability is conclusively fixed, such statute is unconstitutional as being within the prohibition of the Fourteenth Amendment. The Federal Courts are quick to safeguard the rights of citizens of the sovereign states under this Amendment. When, therefore, the requirement of "due process of law in tax proceedings has been sought to be complied with by a statutory provision for the requisite hearing there is a *prima facie* presumption that such "due process of law" was meant to be as absolute as is reasonably consistent with the terms of the statute. Where a state has consented to be sued in a tax proceeding, this consent will be liberally construed in favor of the taxpayer and the Federal Court will not, unless obliged to do so by the plain sense of the statute, construe the state's consent in such a way as to minimize the opportunity thus afforded.

37 Cyc. 1082.

German Alliance Ins. Co. v. Van Cleave, 61 N. E. 94.

The rule governing the construction of such statutes is particularly vital when, as in the case at bar, the question involved is the constitutionality of a tax sought to be levied against a citizen of one of the United States, by a quasi territory in a more or less embryonic stage of development and possessing at the most only limited and subordinate governmental functions delegated to it by the Federal Congress. The necessity of a strict supervision over the taxing power of Porto Rico was pointed out by the Federal Court of Porto Rico in *Standard Dredging Co. v. Gromer*, 5 Porto Rico Fed. 142, the Court using these significant words:

"In a territory that is not even incorporated into the United States, the taxing power can be

scrutinized and the local government will be confined within the powers conferred upon it by the national government."

Although this case was reversed by this Court, it was on entirely different grounds.

The Insular Court, it must be remembered, are not constitutional courts in which the judicial power conferred by the Constitution on the general government, is or can be deposited; they are merely legislative courts created by virtue of the right existing in Congress to make all needful rules and regulations respecting the possessions belonging to the United States. While the Insular Courts may form a complete local system in themselves, a construction of the statute in question, which would give them exclusive jurisdiction of actions brought by citizens of the sovereign states involving a question of the constitutionality of a tax levied, is not to be entertained unless unavoidable. The statute is to be construed liberally in order that the Federal Court may protect the property rights of citizens of the states and enforce the laws and Constitution of the United States. And in accordance with the principles stated, this Court will determine the merits of this action unless it clearly and unequivocally appears that The People of Porto Rico have expressly coupled their consent to be sued with the condition that the Federal Court have no jurisdiction in the premises.

That the Federal Courts in the states are averse to surrendering their authority in cases of diverse citizenship is shown by the long line of decisions of this Court holding that even where a state has qualified its consent to be sued with the express condition that the suit be brought only in its own local courts, nevertheless, the Federal Court, if other jurisdictional facts appear, will entertain suits in equity restraining proposed illegal action of state officials, and also holding that where a gen-

eral right is conferred by a state legislature, such as the granting of a right of action for death caused by wrongful act, this right of action can be enforced in any Federal Court within the state having jurisdiction of the parties and cannot be withdrawn from the cognizance of such Federal Court by any provision of state legislature that it shall only be enforced in a state court.

Chicago N. W. R. Co. v. Whitton, 13 Wall. 270.

Reagan v. Farmer's Loan & T. Co., 154 U. S. 362.

Smyth v. Ames, 169 U. S. 466.

Reeves v. Smith, 178 U. S. 436.

Will not this Court be equally as reluctant to relinquish the right of the Federal Court of Porto Rico to consider and determine the legality of Porto Rico's exercise of her taxing power?

The cases cited (Plaintiff in Error's Brief, pp. 46-49) against a liberal construction of the statute in question are not applicable. They are all cases where the consent of the United States or one of the sovereign States of the Union was in question and hold merely that suit cannot be brought without statutory consent. They lay down no rule or principle of law that, an express statute granting such consent having once been enacted, that statute should be strictly construed. Indeed, so far as they hold that a state's consent to be sued can only be given by statute they must be considered overruled by the recent decision of this Court in *People of Porto Rico v. Ramos*, 232 U. S. 627, wherein this Court held that Porto Rico could not invoke its immunity from suit without its consent to defeat the jurisdiction of the Federal Court of Porto Rico of an action in which it had been made a party defendant through the voluntary petition of its Attorney General, thus clearly demonstrating that

this Court in *Porto Rico v. Rosaly*, 227 U. S. 270, when it held that Porto Rico possessed such sovereignty as to be immune from suit without its consent, did not mean to imply thereby that such consent could only be evidenced by an express statute of the Legislative Assembly. If the cases cited by our learned adversary on this particular phase of the question are not to be considered overruled by the Ramos case, it is only because the court is inclined to more readily read a waiver of Porto Rico's immunity from suit into the actions of its officials than it is in the case of the sovereign states.

And certainly the contention of our learned adversary (Plaintiff in Error's Brief, p. 50) that Porto Rico can only consent to be sued by Act of the Legislature is squarely opposed to the decision of this Court in the Ramos case.

Admitting, however, that Porto Rico's immunity from suit should be strictly safeguarded and no construction of the acts of its officials indulged in which would result in an implied consent on its part to be sued, without statutory provision therefor, nevertheless we find no justification in any adjudicated case for the proposition that, Porto Rico having passed an express statute granting such consent, that statute should not be liberally construed in reference to the courts in which Porto Rico granted its consent to be sued.

D. Assuming that the statutory consent of Porto Rico to be sued was impliedly limited to suits brought in the Insular Courts, the various appearances and answers to the merits of the Attorney General and the Treasurer of Porto Rico and their failure to object to the jurisdiction of the Federal Court for over eight months constituted a waiver of that implied limitation.

In refutation of the contention (Plaintiff in Error's Brief, p. 50) that Porto Rico's exemption from suit can

only be waived by "Act of the Legislature", we need only refer to the two most recent decisions of this Court on the question; *People of Porto Rico v. Ramos*, 232 U. S. 627, and *Porto Rico v. Emmanuel*, 235 U. S. 251. The Ramos case held that Porto Rico could not invoke its immunity from suit without its consent to defeat jurisdiction of an action in which, through its Attorney General, it voluntarily petitioned, after due deliberation, to be made a party defendant; and that the jurisdiction of the Federal District Court for Porto Rico of an action in ejectment brought by a citizen of Porto Rico against a subject of Great Britain was not ousted because Porto Rico subsequently became, with its consent, the sole party defendant. In that case, after the case was set for trial between the original parties, the Attorney General simply petitioned the Court for a continuance of the trial for time to enable him to ascertain if the people of Porto Rico should be made a party defendant to the cause. Upon the date to which the cause was continued the Attorney General again appeared and represented to the Court that the people of Porto Rico were interested parties to the action. An amended complaint was then filed and, upon motion of the Attorney General, his name was entered as counsel for the People of Porto Rico and leave granted to file a demurrer. The demurrer recited that the Attorney General appeared specially for the sole purpose of challenging the jurisdiction of the Court in the case, and demurred to the complaint because the plaintiff and the sole defendant, The People of Porto Rico, were both citizens of Porto Rico and because the People of Porto Rico, as a recognized entity, was so far a sovereign as to be exempt from suit at the instance of private individuals. The demurrer was overruled, and this Court said:

"But one contention is argued, that is, that the district court had no jurisdiction to entertain the suit against Porto Rico 'without its consent and

against its active opposition.' *Porto Rico v. Rosaly y Castillo*, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352, is cited to sustain the contention. It was said in that case that the government 'established in Porto Rico is of such a nature as to come within the general rule exempting a government sovereign in its attributes from suit without its consent.' This case, however, is not within the rule. In that case Porto Rico was a defendant in the first instance. In this case it voluntarily petitioned to be made a party, asserting rights to the property in controversy, and, against the opposition of the plaintiff (defendant in error), it was made a party defendant. And this action was not improvident. Its attorney general took time to consider. He applied for and obtained a continuance of the case to determine the best course to secure the interests of the people of Porto Rico,—whether to assert its rights in the then litigation, or attempt to keep them under the immunity of its sovereignty from attack. His decision had the support of substantial reasons. The property came to Porto Rico as an escheat, and came therefore as it was held by Eliza Kortright and Wood. If held in wrong by them, it was held in wrong by it, and the attorney general may have considered it well worth while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. *United States v. Lee*, 106 U. S. 196, 27 L. ed. 171, 1 Sup. Ct. Rep. 240; *Stanley v. Schwalby*, 147 U. S. 508, 37 L. ed. 259, 13 Sup. Ct. Rep. 418. But, whatever his reasons, he certainly asked for time, as we have seen, 'to enable him to ascertain if the people of Porto Rico should be made a party defendant' in the cause; and having been granted the time, he appeared again in the cause and represented to the court that Porto Rico was an interested party to the action, and the court, having heard the arguments of opposing counsel, ordered Porto Rico to be made a party, and directed plaintiff to amend his complaint in execution of the order. Porto

Rico, therefore, through its attorney general, not only gave its consent to be a party to the cause, but invoked and obtained the ruling of the court against the resistance of the plaintiff to make it a party to the cause.

"The complaint having been amended as moved and directed, and nearly a year having elapsed, there came a change of view; but the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it, and to come in and go out of court at its will, the other party having no right of resistance to either step."

This Court, therefore, in the Ramos case, has held that the rule stated in *Porto Rico v. Rosaly*, 227 U. S. 270, is subject to limitations. It is to be carefully noted that the acts of the Attorney General in the Ramos case constituted a waiver of Porto Rico's immunity from suit without its consent, even *though there was no statute whatsoever on the question*, no "Act of the Legislature" granting consent to be sued. How much more potent are the reasons for considering the acts of the Treasurer and Attorney General in the case at bar as constituting such a waiver when it is remembered that in the present case Porto Rico enacted an express statute granting its consent to be sued and the waiver at best is merely of an ambiguous and implied limitation of that consent in respect of the judicial tribunal to which it was to apply. Our adversary seems to have overlooked this distinction. He forgets that the question of waiver in the case at bar is not, as he assumes, a question of whether such a waiver can be found where no statute has been passed by Porto Rico granting its consent to be sued; and the cases on this point cited by him are inapplicable (Plaintiff-in-Error's Brief, pp. 51-54), even if they are reconcilable, as far as Porto Rico is concerned, with the Ramos case; because the cases he cites merely hold that the absence

of a state statute consenting to suit cannot be supplied by appearance and answer of a state official. He seeks to distinguish the Ramos and the Rosaly cases on the ground that in the Rosaly case Porto Rico was a defendant in the first instance, whereas in the Ramos case it voluntarily petitioned to be made a party defendant and subsequently became the sole party defendant, stating that "if the decision in the Ramos case cannot be rested upon this distinction, then, with deference, it is unsound." But even if the two cases are not in principle distinguishable on that ground, the Ramos case is sound: While Porto Rico cannot be sued without its consent (Rosaly case) such consent may be waived although no statutory consent to suit has been granted (Ramos case). And if the two cases are distinguishable on that ground, nevertheless the fact that Porto Rico in the case at bar was a defendant in the first instance (as in the Rosaly case) and not an intervenor (as in the Ramos case) neither brings us within the principle enunciated in the former nor takes us out of the principle enunciated in the latter. This is so because the facts in this case are totally different from the facts in either the Rosaly or Ramos cases, for *in neither one of those cases was there any statute granting consent to be sued.*

The question of waiver is not discussed in the opinion in the Rosaly case. But, taking the statements made by our adversary (Plaintiff-in-Error's Brief, pp. 62-63) as correct, *i. e.*, that the record in the Rosaly case shows that the Attorney General of Porto Rico appeared and answered without raising the question of jurisdiction at all in the *nisi prius* court, and that there was no question of jurisdiction raised, or claim made, as to the immunity of The People of Porto Rico from suit without their consent until the case came before the Supreme Court of Porto Rico; even assuming that the Rosaly case had expressly held that the appearance and answer of the Attorney General did not constitute a waiver, it

would not follow that his appearance and answer in the case at bar was not a waiver. There being no statute in the Rosaly case, it might well be held that the appearance and answer of the Attorney General could not supply such statute, Porto Rico being a party in the first instance; whereas in the Ramos case his appearance and answer could supply such statute, Porto Rico being an intervenor and not a party in the first instance. We contend that in the case at bar the appearance and answer to the merits of the Treasurer, even though Porto Rico was a defendant in the first instance, constituted a waiver *simply of an implied limitation contained in an express statute granting Porto Rico's consent to be sued*, not such a waiver, as would have been the case in the Rosaly decision, *i. e.*, of any statutory consent whatsoever.

The question now before this Court, in other words, has not been answered by either the Rosaly or the Ramos decisions, nor has it ever been passed upon by this Court. It is one of novel impression. The question succinctly stated is this: Where the Legislature Assembly of Porto Rico has by express statute granted Porto Rico's consent to be sued in any court having competent jurisdiction but has by implication, in a subsequent clause allowing appeal to the Supreme Court of Porto Rico, limited its consent to suits brought in the Insular Court, does the appearance and answers on the merits to three separate pleadings, of the Treasurer and the Attorney General and their acquiescence in the jurisdiction of the Federal Court for eight months, constitute a waiver of that implied limitation?

That question we believe should be answered in the affirmative. And we believe that the cases of *People of Porto Rico v. Ramos*, 232 U. S. 627, and *Porto Rico v. Emmanuel*, 235 U. S. 251, thought not decisive of this question, throw considerable light on it. In the Ramos case the fact that the Attorney General took plenty of

time, as the Court said, "to determine the best course to secure the interests of the people of Porto Rico,—whether to assert its rights in the then litigation, or attempt to keep them under the immunity of its sovereignty from attack", appears to have been largely present in the mind of the Court. The Court repeatedly emphasized this. It said, "And this action was not improvident. Its Attorney General took time to consider";—"whatever his reasons, he certainly asked for time";—"nearly a year having elapsed, there came a change of view". Similarly in the case at bar, the Treasurer of Porto Rico by the Attorney General appeared and answered the complaint at length on the merits. Subsequently the Attorney General in writing stipulated time for trial and a waiver of trial by jury. Four months later the said Treasurer by the said Attorney General interposed an answer on the merits to the Supplemental Complaint. He also interposed an answer on the merits to the Amended Complaint. It was not until eight months after his first answer on the merits was filed that either the Treasurer or the Attorney General of Porto Rico questioned in any way the jurisdiction of the District Court to entertain this action. Thus the Treasurer and Attorney General "took time to consider"; their actions were "not improvident"; but "nearly a year having elapsed, there came a change of view".

If the Attorney General of Porto Rico in the Ramos case could exercise the tremendously greater power of practically creating a statute of Porto Rico granting its consent to be sued, why cannot he in the case at bar, having acquiesced so long in the jurisdiction of the lower court, be held to have waived a mere implied limitation contained in a statute wherein Porto Rico had already consented to be sued? Such a holding would not in any respect be opposed to the decision in the Rosaly case, but would simply throw additional light on that case, just as the Ramos decision did. Assuming that the Rosaly

case goes so far as to decide that, where there is no statute granting Porto Rico's consent to be sued, the appearance and answer of Porto Rico by the Attorney General does not constitute a waiver, the holding we urge would merely be a declaration of the law applying where there is such a statute.

In Porto Rico v. Emmanuel, 235 U. S. 251, the appeal was from a judgment of the District Court of the United States for Porto Rico against the People of Porto Rico, resulting from the unauthorized registry of lands of the plaintiff in the name of the People of Porto Rico. The judgment was reversed but *solely on the ground that the action was outlawed by the Porto Rican statute of limitations*. That statute, Section 1869 of the Civil Code of Porto Rico, and pertinent sections, provided:

"Sec. 1869. The following prescribe in one year:

1. Actions to recover or retain possession.
2. Actions to demand civil liability for grave insults or calumny, and for obligations arising from the fault or negligence mentioned in Section 1803, from the time the aggrieved person had knowledge thereof."

"Sec. 1803. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done."

"Sec. 1804. * * * The state is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding section shall be applicable."

A careful reading of Mr. Justice Pitney's opinion in this case reveals a grave *doubt* in the mind of the Court

whether Porto Rico under the facts was liable at all, in view of the provisions of Section 1804. The Court seems to have doubted whether the Treasurer of Porto Rico had acted merely as a "special agent." It stated that "if the plaintiff can legally recover, it must be by virtue of section 1804 of the Code, which is cited also as manifesting the government's consent to be sued."

The Court said,

"It seems to us clear that an action against the State based upon the pertinent clause of § 1804, is an action to demand civil liability 'for obligations arising from the fault for negligence mentioned in § 1803,' within the meaning of § 1869",

and then goes on to discuss that part of section 1804 which exempts the state from liability when the damage is caused by the official to whom properly it pertained to do the act performed, viz.: the cause, "in which case the provisions of the preceding section shall be applicable", saying,

"This cannot reasonably be interpreted as excluding the liability of the state under § 1803 in other cases, but is *evidently intended to impose upon the official himself*, in respect to damages caused in the performance of his ordinary duties, a personal liability under the provisions of § 1803, leaving the state liable in the sense of that section when it acts through a special agent".

The Court further stated,

"Assuming, however, that the facts certified in the findings, taken by themselves, show a liability on the part of the People of Porto Rico under these sections, still defendant, both by demurrer and by answer, set up prescriptions by virtue of § 1869 of the Civil Code."

The Court then held that (p. 260) that section 1869 applied to the action thus:

"No reason is suggested for limiting the prescription to one year in the case of a default or negligence attributable to defendant personally, *and leaving the action unlimited when it is attributable to the fault of defendant's representative or agent.*

Section 1869 being thus found to be applicable to such action as the present, etc."

It seems to us very apparent from the above extracts from Mr. Justice Pitney's opinion that the Court really considered that the action should have been against an official for personal liability, and that under the facts the State itself was not liable under section 1804, since it did not act in that case through a "special agent". This thought was evidently in the mind of the Court when it said at page 257,

"We have recently decided that the government of Porto Rico is of such nature as to come within the general rule, exempting a government, sovereign in its attributes, from being sued without its consent (*Porto Rico v. Rosaly y Castillo*, 227 U. S. 270, 57 L. ed. 507, 33 Sup. Ct. Rep. 352). Upon the face of the present record it may be questionable whether defendant fairly raised in the pleadings the question of its general immunity from action, or whether, on the other hand, its pleadings, construed as a whole, did not rather amount to a consent to litigate the merits." (Italics are ours.)

The judgment against Porto Rico was, indeed reversed, but solely on the ground that the one-year prescription applied whether the suit was against an official for personal liability or against Porto Rico itself under section 1804. The last preceding quotation becomes, therefore, extremely significant as bearing directly upon the case

at bar. For there is no escape from the fact that the Court, thereby, clearly let it be understood that if it had not been for the statute of limitations pleaded by Porto Rico, the action could have been maintained against Porto Rico, even though by section 1804 it had expressly withheld its consent to be sued where the damages was caused by an "official" and not by a "special agent", because the pleadings on the merits would amount to a waiver of such restriction and a "consent to litigate the merits".

Thus in the Emmanuel case, unlike the Rosaly and Ramos cases, there was a statute granting Porto Rico's consent to be sued; and that statute contained a limitation on such suit, *i. e.*, suit could only be brought against Porto Rico when it acted through a "special agent". Yet it appears from the opinion that such limitation could be waived by the pleadings of the defendant. If that is so, then the limitation contained in the statute at bar can be waived by the pleadings of the defendant. Our adversary (Plaintiff in Error's Brief, p. 62) seeks to distinguish the Emmanuel case by saying "This expression would indicate it to have been the view of the Court that consent to suit, in the case of Porto Rico, might be conferred by a mere pleading. But that expression was but dictum, and, furthermore, the merits of that case involved the construction and application of a statute of Porto Rico which gave a general consent to suit in certain cases". Exactly; just as the statute at bar gave a general consent to suit for the recovery of taxes paid under protest.

In view of the decisions of this Court in the Rosaly, Ramos and Emmanuel cases, we believe the essential consideration in the case at bar on the question of waiver is the fact that Porto Rico had expressly, by statute, given its consent to be sued. And whether or not there was a waiver depends on whether or not this Court de-

cides that an implied limitation in an express statute may be waived by appearance and answer. This Court, as far as we have been able to discover, has never decided that question. The Court below evidently had this consideration in mind when it said (Opinion, R. 22) :

"The question next arises whether the defendant has not submitted to the jurisdiction of the Court by appearing and filing an answer. This would seem to be the law. A party cannot be permitted to blow hot and cold, to appear so far as it is advantageous to him and to withdraw his appearance when it ceases to be so. The appearance was by the Treasurer of Porto Rico in his own name and by the Attorney General of Porto Rico representing the defendant for all purposes. It would seem true also that if the defendant was ever in court, as cannot be disputed, he is now while making his present motion. It is true there are cases holding that an official cannot waive the rights of a State by appearing in a suit, but this is not one of such cases. *Adams v. Bradley*, Fed. case No. 48; *Case v. Terrell*, 11 Wall. 199, 202; *United States v. Lee*, 106 U. S. 196, 205."

The Court below correctly held that the facts in this case did not bring it within the Bradley, Terrell or Lee cases. Those are the very cases relied on by our learned adversary (Plaintiff in Error's Brief, pp. 51, 52 and 54) and, as we have heretofore shown at the beginning of our discussion under the subdivision D of Point II herein, those cases are irrelevant and inapplicable to the facts in this case, because in those cases there was no statute of consent at all and they merely decide that such statute cannot be supplied by appearance and answer.

In the case of *Smith v. Reeves*, 178 U. S. 436, heretofore discussed at some length in other connections, the question of waiver did not arise since the Treasurer immediately objected to the jurisdiction of the Federal Court. We conceive, however, that if the Treasurer in that case

had answered to the merits and acquiesced for a considerable length of time in the jurisdiction of the Federal Court, this Court might easily have held that there had been a waiver of the provision of the California statute limiting suits against the state for the recovery of taxes to the Superior Court of the County of Sacramento; and we believe it unquestionably would have so held if the California statute had been analogous to the Porto Rican statute and had allowed suit in any court of competent jurisdiction, merely containing in addition a provision which was equally susceptible of a construction limiting such consent to the Superior Court of Sacramento County or of a construction authorizing the Federal Court to assume concurrent jurisdiction. For the Reeves case, itself, says:

"So in *Clark v. Barnard*, 108 U. S. 436, 477: 'The immunity from suit belonging to a state, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure; so that in a suit otherwise well brought in which a state had sufficient interest to entitle it to become a party defendant, its appearance in a court of the United States would be a submission to its jurisdiction'."

In Conclusion on Point II.

If this action is not against The People of Porto Rico but merely against the Treasurer of Porto Rico to recover specific moneys paid under protest, separately designated and kept by him as a separate fund repayable, on order of the Court without further legislative appropriation, in preference to all other claims on the Treasury,

or

If the statute in question, having in general terms granted Porto Rico's consent to be sued in any court of

competent jurisdiction, does not thereafter by necessary implication limit such consent to the Insular courts,

or

If such limitation has been waived by the acts of the Treasurer and Attorney General in thrice answering to the merits and for many months acquiescing in the jurisdiction of the lower court,

Then this action was maintainable in the District Court of the United States for the District of Porto Rico.

FINAL CONCLUSION.

The judgment of the District Court should be affirmed.

LORENZO D. ARMSTRONG,
Attorney for Defendant in Error.

JOSEPH W. MURPHY.

New York, February 23, 1916.